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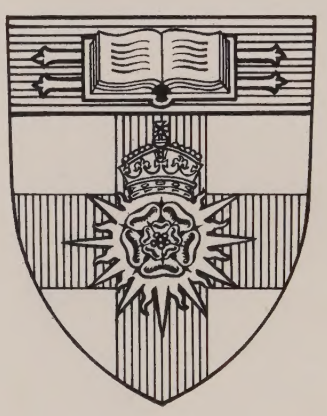

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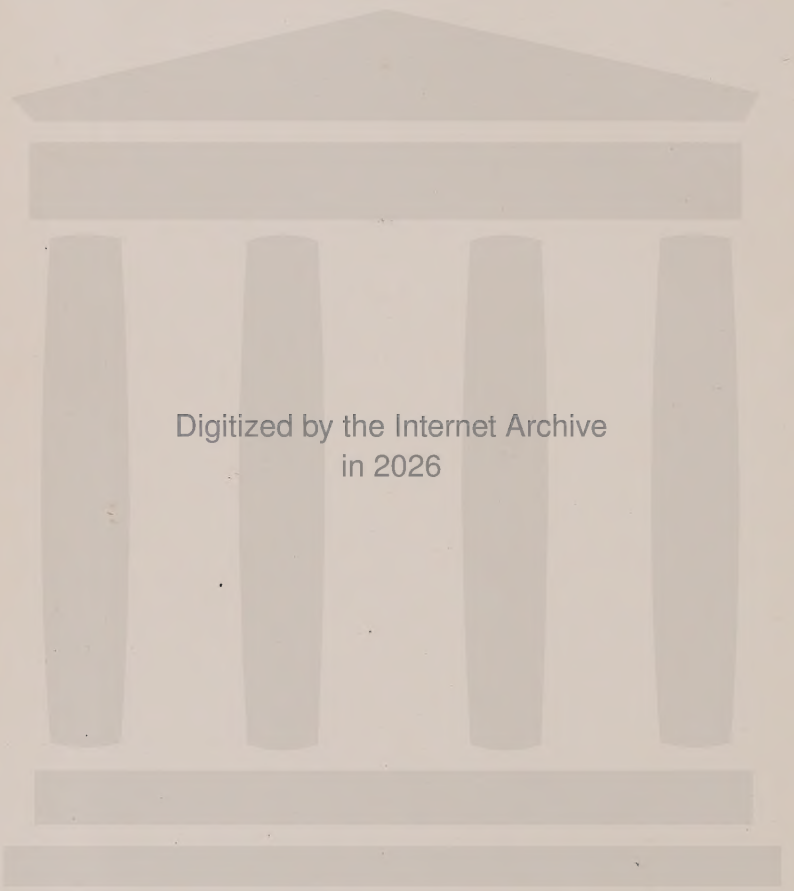
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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE QUEEN'S BENCH DIVISION

AND BY THE

COURT FOR CROWN CASES RESERVED

XLI VICTORIA.

[IN THE COURT OF APPEAL.]

1877
Nov. 7.

IN THE MATTER OF AN ARBITRATION BETWEEN THE SANDBACK CHARITY TRUSTEES AND THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

Inquiry as to Compensation under Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18)—*Taxation of Costs by Master under* 32 *&* 33 *Vict. c.* 18, *s.* 1—*Jurisdiction of Court to review Taxation.*

Where costs of an inquiry before arbitrators under the Lands Clauses Consolidation Act, 1845, "are taxed and settled as between the parties by one of the taxing masters of the superior Courts of law" under s. 1 of 32 & 33 Vict. c. 18, the Court has no jurisdiction over the master's taxation on a motion to review.

Owen v. *London and North Western Ry. Co.* (Law Rep. 3 Q. B. 54), approved.

MOTION for an order calling on the North Staffordshire Railway Company to shew cause why the master should not review his taxation; or why, if necessary, a mandamus or other writ should not be issued for effecting the purpose aforesaid.

The company had, under the powers of their Act, taken certain land, marl pit, and premises, and had injuriously affected certain other land, brick works, and mines belonging to the charity trustees, and they offered 1500*l.* as compensation. On the 30th of

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June, 1870, the charity trustees made a claim for 6510*l.* On the 7th of December, 1874, it was arranged between the company and the charity trustees that the amount to be paid for compensation should be referred to arbitration under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18); each party appointed an arbitrator, and the two arbitrators appointed an umpire. The umpire, by his award, awarded 3650*l.* for purchase-money and all damage by severance or otherwise. The costs were taxed by one of the masters of the Common Law Courts, under s. 1 of 32 & 33 Vict. c. 18 (1). The charity trustees, being dissatisfied with the master's taxation, applied to the Queen's Bench Division to review it. The application was refused, on the ground that the case was governed by *Owen* v. *London and North Western Ry. Co.* (2)

The charity trustees appealed.

A. Brown, in support of the appeal. The question is, whether the Queen's Bench Division can review the master's taxation, where a case of disputed compensation is determined by arbitration under the Lands Clauses Consolidation Act, 1845, and the costs of and incidental to the arbitration and award are taxed by one of the taxing masters of the Courts of law under s. 1 of 32 & 33 Vict. c. 18. The Queen's Bench Division decided that this case was governed by *Owen* v. *London and North Western Ry. Co.* (2), and that they had no jurisdiction over the taxation. Their decision is erroneous, for in *Owen* v. *London and North Western Ry. Co.* (2) the compensation was assessed by a jury, and the same considerations do not apply to a case of compensation determined by arbitration. Under the Lands Clauses Consolidation

(1) By 32 & 33 Vict. c. 18, s. 1, where in England under the Lands Clauses Consolidation Act, 1845, or any Act incorporating the same, any question of disputed compensation is determined by arbitration, the costs of and incidental to the arbitration and award shall, if either party so requires, be taxed and settled as between the parties by any one of the taxing masters of the superior Courts of law; and such fees may be taken in respect of the taxation as may be fixed in pursuance of the enactments relating to the fees to be demanded and taken in the offices of such masters; and all those enactments, including the taking of fees by means of stamps, shall extend to the fees in respect of such taxation. By s. 2, 31 & 32 Vict. c. 119, s. 33 is repealed.

(2) Law Rep. 3 Q. B. 54.

Act, 1845, the costs of an arbitration were settled by the arbitrators, but afterwards, under 31 & 32 Vict. c. 119, s. 33, they were taxed by one of the masters of the Court of Queen's Bench, and the fee paid for the taxation was retained by the master for his own use and benefit. But, by s. 2 of 32 & 33 Vict. c. 18, that enactment is repealed, and the costs of the arbitration are to be settled by any of the masters of the superior courts. The fee is to be paid in stamps, and instead of being retained by the master, is to be paid into the treasury. And under s. 36 of the Lands Clauses Consolidation Act, 1845, the submission to arbitration is made a rule of court. This is the mode in which payment of the award is enforced. It would seem, therefore, that in cases of compensation settled by arbitration, the master taxes the costs as a master of the court, and is bound by all the rules relating to taxation in the courts of law, subject to the control and regulations of those courts.

BRAMWELL, L.J. This appeal is an experiment which must fail. There is no ground for an application for a mandamus, for the master has not declined jurisdiction; neither can the Court grant a writ of certiorari, because the master has jurisdiction, and he has exercised it. The main question is, has the Queen's Bench Division jurisdiction to review the master's taxation? I am quite satisfied with the reasons given in *Owen* v. *London and North Western Ry. Co.* (1), that there is no jurisdiction to review the master's taxation. It is said that that case was decided on the ground that the compensation was assessed by a jury, and although there is no jurisdiction to review the taxation under those circumstances, yet that there is jurisdiction in those instances where the compensation is awarded by arbitrators. It is argued that s. 1 of 32 & 33 Vict. c. 18 provides a different mode of taxation from s. 52 of the Lands Clauses Consolidation Act, 1845, for by the latter section, which applies to cases where the compensation is ascertained and settled by a jury, the costs are to be taxed by the master of the Court of Queen's Bench; whereas by s. 1 of 32 & 33 Vict. c. 18, which applies to arbitration, the costs are to be taxed by any one of the taxing masters of the superior Courts of law;

(1) Law Rep. 3 Q. B. 54.

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the fee for taxing is to be taken in stamps, and instead of being received by the master will have to be paid to the treasury. I think, however, that, although the section increases the number of taxing masters, and the fees are to be paid in a different manner, these alterations do not give us the power to review the master's taxation. It is impossible to say that in the case of compensation being settled by arbitration we have power to review the taxation, but in the case where compensation is assessed by the jury we have no power. If the legislature intended the Court to review the taxation, it ought to have conferred this power by express words. An appeal does not exist in the nature of things: a right to appeal from any decision of any tribunal must be given by express enactment. The Queen's Bench Division were quite right in deciding that they could not review the taxation; that is also our judgment; the appeal must therefore be dismissed.

BRETT, L.J. We cannot grant a mandamus, for the master has never declined to exercise jurisdiction, neither can a writ of certiorari be issued, because the master has jurisdiction, and he has exercised it. Then as to the application to review the master's taxation. *Owen* v. *London and North Western Ry. Co.* (1) decided two things. First, the ground on which the Courts exercise a jurisdiction in a matter of taxation is that the office of taxing costs is the business of the Court itself; that this office is delegated to one of its officers, and that the Court has necessarily jurisdiction to control this delegated authority, and therefore a right to review the master's taxation. Secondly, that although a master of the Court of Queen's Bench was appointed by the legislature to tax the costs under the Lands Clauses Consolidation Act, 1845, the master in the matter of taxation was not acting as master, but as a person designated by the Act, and, moreover, as the proceedings were not proceedings in the court, there was no jurisdiction to review the taxation. I am of opinion that these two points were rightly decided. Are the grounds of this decision applicable to the case of compensation awarded by arbitrators under the Lands Clauses Consolidation Act, 1845? An arbitration under this Act is not a proceeding in any Court; in this

(1) Law Rep. 3 Q. B. 54.

respect it resembles a proceeding to assess compensation by a jury, and though by 32 & 33 Vict. c. 18, s. 1, the persons are designated who are to tax the costs in a proceeding in arbitration, they do not act in the taxation as masters. The case of compensation awarded by arbitration being precisely similar to the case of compensation assessed by a jury, the principle of *Owen* v. *London and North Western Ry. Co.* (1) ought to determine this case. Then it is said the master does not take the fee, but it is to be paid in stamps, and the stamps go to the treasury, but this can make no difference. Another point is urged, that as the submission to arbitration can be made a rule of court, the arbitration becomes a proceeding in the court; the submission is made a rule of court only for the purpose of issuing execution, and the officer of the court in doing that is performing only a ministerial act which gives the Court no jurisdiction to review the taxation. The case is not like the cases where costs are taxed by one of the taxing masters in the Court of Chancery, under s. 83 of the Lands Clauses Consolidation Act, 1845, and where it it is said that the taxation may be reviewed; in those cases the taxation proceeds upon an order obtained upon a petition, and therefore the Court of Chancery would have jurisdiction to review the master's taxation, for it is like the taxation of costs in any other case in the Court of Chancery, and therefore that Court would have jurisdiction to review the master's taxation. This appeal must be dismissed.

COTTON, L.J., concurred.

Appeal dismissed.

Solicitor for applicant: *Tyrell, for Challinor & Co., Leek.*

(1) Law Rep. 3 Q. B. 54.

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Nov. 12.

LONDON *v.* ROFFEY.

Practice—New Trial—Action remitted to County Court—Time within which motion must be made—Judicature Act, Order XXXIX. Rules 1 *and* 1*a.*

Rules 1 and 1a of Order XXXIX., do not apply to motions for new trials in actions remitted to the county court for trial under 19 & 20 Vict. c. 108, s. 20. Consequently a motion for a new trial in such an action must be made within the time limited by the old practice.

M75/182
46 D115
216
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1 QBD 181
26 CD 22
58-9

THIS was an action which had been commenced in the Queen's Bench Division and remitted to the Southwark County Court for trial, under 19 & 20 Vict. c. 108, s. 26. The trial took place before the judge of the county court without a jury, in the county of Surrey, on the 14th of June, and a verdict was found for the plaintiff. On the 2nd of July a Divisional Court on the defendant's application granted an order nisi for a new trial, on the ground that the learned judge of the county court had ruled erroneously on a point of law; against which

Cock, shewed cause. The application for the rule was made to the wrong tribunal, and was out of time. It has been held that when a cause is remitted for trial, under 19 & 20 Vict. c. 108, s. 26, the jurisdiction to grant a new trial remains in the superior Court. *Balmforth* v. *Pledge* (1). If Order XXXIX. Rule 1 (Rules of December, 1876) applies, then, when the trial has been by a judge without a jury, the application for a new trial must be to the Court of Appeal.

[COCKBURN, C.J. That rule appears to have been intended to apply only when the trial was before a judge of the superior Court.]

Then it is contended that the application for the new trial should have been made according to the old rule, within four days after the trial, inasmuch as the Divisional Court was then sitting.

A. L. Smith, supported the order. Rule 1b of Order XXXIX. (Rules of December, 1876), provides that when the trial takes place elsewhere than in London or Middlesex, the motion shall be made within the first four days of the next following sittings. This order was obtained within the period so prescribed.

(1) Law Rep. 1 Q. B. 427.

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[COCKBURN, C.J. The rule was obviously meant to apply to cases tried at the assizes.]

It is submitted that this action being still one in the superior Court must be governed by the rules that govern the practice of that Court.

COCKBURN, C.J. I am of opinion that Order XXXIX. does not apply to actions remitted for trial to a county court. The practice before the Judicature Act remains unaltered, except so far as altered by that Act and the rules. Consequently the application should have been made within the period prescribed by the old practice. The order will therefore be discharged.

MELLOR, J., concurred.

Order discharged.

Solicitors for plaintiff: *Ingledew, Ince, & Greening.*
Solicitors for defendant: *Plews, Irvine, & Hodge.*

DOYLE *v.* KAUFMAN.

Nov. 27.

Practice—Renewal of Writ—Extension of Time—Statute of Limitations.

The Court has no power under Order LVII., Rule 6, to extend the time for renewing a writ of summons where the claim would, in the absence of such renewal, be barred by the Statute of Limitations.

In this case a writ had been issued for service without the jurisdiction, but had ceased to be in force, not having been served within twelve months from its date, as required by Order VIII., Rule 1.

In the meantime the period had expired, after which, if no action were brought, the claim in respect of which the writ issued would be barred by the Statute of Limitations.

An application was made at chambers to renew the writ, although the period of twelve months had elapsed, it being contended that under Order LVII., Rule 6, the time for applying to renew the writ under Order VIII., Rule 1, might be enlarged if the justice of the case required it.

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DOYLE v. KAUFMAN.

The application having been referred to the Court,

Willis, Q.C., moved to renew the writ.

[LUSH, J., referred to the case of *Bailey* v. *Owen*. (1)]

Under the old practice there was no power of enlarging the time similar to that given by Order LVII., Rule 6.

COCKBURN, C.J. This application must be refused. The power to enlarge the time given by Order LVII., Rule 6, cannot apply to the renewal of the writ when by virtue of a statute the cause of action is gone.

LUSH, J., concurred.

Application refused.

Solicitors for plaintiff: *Edward Doyle & Sons.*

Dec. 6.

WALKER AND ANOTHER *v.* HICKS.

Practice—Special Indorsement on Writ—Order III., Rule 6*—Order XIV., Rule* 1.

4 C.P.D. 393
395
5 C.P.D. 18
5—25

The writ of summons in an action was indorsed as follows: "The plaintiffs' claim is 399*l.* 9*s.* 7*d.*, the defendant's share or contribution to the payment of certain bills of exchange and promissory notes on which he and the plaintiffs were jointly liable, and which bills and notes have been taken up by the plaintiffs":—

Held, that this indorsement did not constitute a good "special indorsement" under Order III., Rule 6, and therefore the judgment which had been signed under Order XIV., Rule 1, must be set aside.

THE plaintiffs had signed judgment under Order XIV., Rule 1. On the application of the defendant the master had ordered that the judgment should be set aside, on the terms that the amount claimed should be brought into court. On appeal to Denman, J., at chambers he had refused to rescind that part of the master's order which required the bringing into court of the amount claimed.

The indorsement on the writ of summons was as follows:—

"The plaintiffs' claim is 399*l.* 9*d.* 7*d.*, the defendant's share or contribution to the payment of certain bills of exchange and pro-

(1) 9 W. R. 128.

missory notes on which he and the plaintiffs were jointly liable, and which bills and notes have been taken up by the plaintiffs."

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WALKER v. HICKS.

Gadsden, for the defendant, moved by way of appeal from the order of Denman, J., to rescind that part of the order that made the bringing the money into court a term of setting aside the judgment. He contended that there was no special indorsement on the writ within Order III., Rule 6, and consequently no power to order final judgment under Order XIV., Rule 1.

Francis, for the plaintiffs, shewed cause.

COCKBURN, C.J. The 6th Rule of Order III., enacts that the writ may be specially indorsed with the particulars of the amount sought to be recovered. The object of the special indorsement is this: on the one hand, it is to have a very prompt and summary effect in favour of the plaintiff, by entitling him to apply to sign final judgment under Order XIV., and on the other hand, it is intended that the defendant should have an opportunity of avoiding such further proceedings by payment of the debt. I think a party, who is placed in the predicament of being liable to have a judgment signed against him summarily, is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist. On looking to the forms of indorsements in the schedule to the rules, I find that in the examples of special indorsements under Order III., Rule 6, in actions on promissory notes and bills of exchange, full particulars are given of the amount and date of the instrument and the parties thereto. If such particulars must be given when the action is on the bill itself, à fortiori, I think they must be given when the claim is, as here, in respect of a share or contribution to the payment of bills and notes paid by the plaintiffs. It seems to me that a party is entitled, before summary proceedings for judgment are taken against him, to know specifically what is the claim against him.

MELLOR, J. I am of the same opinion. It seems to me very important to prevent any loose dealing with regard to the form of special indorsements. A very summary remedy is given to the plaintiff where there has been such an indorsement. But before

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the plaintiff can ask for final judgment the defendant ought to have afforded to him, by the indorsement of reasonably specific particulars of claim on the writ, an opportunity of seeing whether the claim is one to which he has any defence or not. The examples given in the schedule all support our view; and I quite agree with my Lord that if, in the ordinary action on a bill of exchange, such particulars as are given in the examples are necessary, still more are they necessary in an action for contribution to the amount of bills paid by the plaintiff such as this is. For these reasons the order must be varied, and the judgment set aside unconditionally.

FIELD, J., concurred.

Order accordingly.

Solicitor for plaintiffs: *Behrend.*
Solicitor for defendant: *Withall.*

Nov. 29.

RE THE BRISTOL AND NORTH SOMERSET RAILWAY COMPANY.

Mandamus, Rule for—Impossibility of performing Statutory Duty—Want of Funds.

5 Q.B.D. 322

The Court will not issue a writ of mandamus against a public body when it is clearly shewn that the performance of the duty sought to be enforced is impossible, by reason of want of funds not involving any default on the part of such body.

An order was issued by the Board of Trade, under the 7th section of the Railway Clauses Act, 1863 (26 & 27 Vict. c. 92), directing a railway company to make a bridge for the purpose of carrying a turnpike road over their line instead of crossing the same on the level.

Previously to the making of this order, the company had exhausted all their powers of raising money in making the line, and, the undertaking proving a failure, they had leased their line in perpetuity to another company, and such lease was confirmed by a special Act of Parliament. The lessees took all the profits of the line, paying a portion of the interest due to the company's debenture stock holders. The company consequently had no funds for the construction of the bridge.

On an application for a mandamus to compel the company to comply with the order of the Board of Trade, the above facts being shewn, the Court discharged the rule for the mandamus.

IN this case an order had been made by the Board of Trade upon the Bristol and North Somerset Railway Company, under s. 7

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RE THE BRISTOL AND NORTH SOMERSET RAILWAY CO.

of the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), requiring the company, within eighteen months of the date of the order, to carry a certain turnpike road at Radstock over their railway, by means of a bridge, instead of crossing the same on the level, on the ground that the existing level crossing was dangerous to the public.

It appeared, upon affidavit, that the Bristol and North Somerset Railway Company had, soon after obtaining its original Act in 1863, fallen into difficulties. An Arrangement Act had to be obtained in 1869, under which its creditors became stockholders, and not only were the whole of the company's capital and borrowing powers exhausted in partly completing the line, but the line could never have been finished if it had not been for the co-operation of the Earl of Warwick, a landowner interested in the completion of the undertaking, who guaranteed and carried out the completion of the line, and the company still owed him upwards of 90,000*l.* It further appeared that the company was entirely without funds, and that their line was worked in perpetuity by the Great Western Railway Company, under agreements confirmed by the Great Western Railway Various Powers Act, 1867, and the Great Western Railway Additional Powers Act, 1871. By virtue of these agreements the Great Western Railway Company had the exclusive use and management of the property of the Bristol and North Somerset Railway Company. The Great Western Railway Company had worked the line from the date of its opening to the present time, and under a guarantee given by them, they paid the interest on a portion of the debenture stock of the Bristol and North Somerset Railway Company. They had received certain small amounts over and above what they had paid for the above-mentioned purpose; but under the terms of the said agreements they claimed to retain all such amounts, and the Bristol and North Somerset Railway Company had not, from the date of the opening of their line, received any money whatever from the traffic thereof.

The Bristol and North Somerset Railway Company not having complied with the order of the Board of Trade, a rule nisi had been obtained for a mandamus to compel them to do so.

Littler, Q.C., shewed cause. He contended, inter alia, that the

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Court would not make the rule absolute for a mandamus, when it was practically impossible for the railway company to comply with the writ for want of funds, such want of funds not being brought about by any default on the part of those managing the company.

Sir J. Holker. Q.C., A.G., and *Bowen*, supported the rule. The absence of funds is not an answer to the application for the writ to enforce performance of a statutory duty. The company cannot, by using up their funds for other purposes, discharge themselves from the liability to carry out a duty which is imposed upon them for the public safety: *Reg.* v. *Eastern Counties Ry. Co.* (1).

[COCKBURN, C.J. The justice of the case would seem to be that the Great Western Railway Company should perform this duty.]

It is very doubtful whether there is any remedy against them. The 112th and 113th sections of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), throw upon the lessees all the obligations imposed by that Act or the special Act upon the company. This would not render the lessees liable to the obligation imposed by the Railways Clauses Act of 1863. It is frequently the case that the special Act imposes on the lessees all the liabilities of the company, but there are not any such provisions in this case.

COCKBURN, C.J. It would be idle to make this rule absolute if in the end there would be no possibility of enforcing obedience to the mandamus. The Bristol and North Somerset Railway Company is virtually defunct. It has no power of raising money. Its share capital is spent, and its borrowing powers are exhausted. It has parted with the possession and use of the railway in perpetuity to the Great Western Railway Company. The affair was bankrupt, and it was only by the Great Western Railway Company's taking it in as part of their system that the line could continue to exist. Under these circumstances, if the rule were made absolute, how could the mandamus be enforced? The company has no funds or property except that airy nothing, the reversion after a perpetuity. This Court cannot put people in prison for not complying with an order when they have no means of doing so. The

(1) 10 A. & E. 531.

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Board of Trade have thought that it was essential to the public safety that this bridge should be made. That was a question which it was for them to decide. It is unfortunate that the machinery of the law would seem to fail with regard to the carrying out of their decision. It was contended that the Great Western Railway Company cannot be ordered to make the bridge under the 112th & 113th sections of 8 & 9 Vict. c. 20. As that company has taken upon itself the maintenance and management of the Bristol and North Somerset Company's line, and receives all the benefits arising therefrom, in reason and justice they ought to bear all the liabilities that would otherwise be imposed upon the Bristol and North Somerset Company. If they cannot be made so liable under the existing state of the law, we can only regret that it is so, but to enforce by mandamus an order which imposes on a virtually defunct company a duty which it is impossible for them to discharge, would be contrary to the elementary principles of justice. The rule must be discharged.

MELLOR, J., concurred.

Rule discharged.

Solicitors for appellant: *Solicitors to the Board of Trade.*

Solicitors for the Bristol and North Somerset Railway Company: *Frere, Foster, & Frere.*

EX PARTE CURTIS.

Dec. 10.

Appeal to Quarter Sessions against Conviction, Notice of—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 52—"*Court of Summary Jurisdiction*"—*Service on Clerk to Justices insufficient.*

A notice of appeal against a conviction under s. 12 of the Licensing Act, 1872, by two of the justices of the Cinque Ports, was addressed generally to the justices of the Liberties of the Cinque Ports, without naming any particular justices, and was served upon the clerk to the justices out of court:—

Held, that such notice, and the service thereof, were insufficient, as not being in compliance with the 52nd section of the Licensing Act, which requires notice of appeal to be given to the "court of summary jurisdiction."

IN this case a rule nisi had been obtained for a mandamus to the deputy-recorder of Sandwich, to enter continuances and hear

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EX PARTE CURTIS.

an appeal against the conviction of the appellant by justices for being drunk on licensed premises, under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12.

It appeared that the hearing took place at Ramsgate, before seven justices acting for the Liberties of the Cinque Ports, and the conviction was signed by two of such justices. Within five days after the conviction the appellant served a notice of his intention to appeal upon a gentleman who acted as clerk to the justices of the Cinque Ports when they sat at Ramsgate. This notice was not served in court, and was addressed generally to Her Majesty's Justices of the Peace for the Liberties of the Cinque Ports, the names of the justices who convicted not appearing upon the notice. The deputy-recorder dismissed the appeal, on the ground that the notice was not in compliance with the 52nd section of the Licensing Act, 1872, which requires the notice to be given to "the court of summary jurisdiction."

The "court of summary jurisdiction," by the interpretation clause (s. 74) of the Licensing Act, 1872, means "any justice or justices of the peace or other magistrate to whom jurisdiction is given by the Summary Jurisdiction Act, 1848." (1)

Kingsford shewed cause against the rule. He contended that the deputy-recorder had no jurisdiction to hear the appeal, because the notice of appeal was bad, and cited *Reg.* v. *Bedfordshire* (2); *Reg.* v. *Eaves.* (3)

Deane supported the rule. He cited *Reg.* v. *Goodall.* (4)

(1) It appeared that the deputy-recorder had dismissed the appeal upon the preliminary objection to the notice, without hearing the merits, but on the application of the appellant granted a case. It was found that the case, under those circumstances, would be useless, because the Queen's Bench Division will not entertain a case stated from quarter sessions upon an order which does not finally dispose of the appeal: *Reg.* v. *Sutton Coldfield* (Law Rep. 9 Q. B. 153). The mandamus, therefore, was applied for, in order that the deputy-recorder might proceed to hear the case on the merits, and so a case might be effectually stated. It was contended by the appellant's counsel that the preliminary objection to the notice could not be relied on, under the circumstances, as a ground for dismissing the rule, but the Court thought that the question of the validity of the notice was necessarily involved in the question whether the mandamus should be granted.

(2) 11 A. & E. 134.

(3) Law Rep. 5 Ex. 75.

(4) Law Rep. 9 Q. B. 557

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EX PARTE CURTIS.

COCKBURN, C.J. I am of opinion that this rule should be discharged, on the ground that the deputy-recorder was right in refusing to hear the appeal. The notice of appeal was not addressed to the court of summary jurisdiction as required by the Act, but to the whole body of the Cinque Port justices. The object of the notice is to give information to the particular justices who convicted, in order that they may take care that the grounds on which they acted are brought forward before the quarter sessions. It is not, therefore, a mere matter of form, but one of substance. It appears to me that this notice was not in compliance with the Act.

MELLOR, J. I agree that the notice was bad.

LUSH, J. I am of the same opinion. The statute says that notice must be given to the court of summary jurisdiction. That means, in my opinion, the justices who sign the conviction. Then again, it is a question whether the service on the clerk was a good service on the justices. I am clearly of opinion that it was not. It is not the duty of the clerk to go and find out the justices and serve them. It is made a condition of the right to appeal that notice of it shall be brought home to the justices, that they may have an opportunity of supporting their decision before the Court above.

Rule discharged.

Solicitors for appellant: *Kingsford & Dorman, for Dorman.*
Solicitor for respondent: *Boys.*

1877
May 29.

[IN THE COURT OF APPEAL.]

IN THE MATTER OF AN ARBITRATION BETWEEN THE GOVERNORS OF THE COLLEGE OF CHRIST, BRECKNOCK, AND MARTIN.

Practice—Award, Time for setting aside—9 & 10 Wm. 3, c. 15, s. 2—Judicature Act, 1873 (36 & 37 *Vict. c.* 66) *s.* 26.

6 QBD 67

By 9 & 10 Wm. 3, s. 2, an application to set aside an award must be made before the last day of the term after the arbitration.

By 36 & 37 Vict. c. 66, s. 26, "terms" are abolished, but they may continue to be referred to in all cases in which they were used as a measure for determining the time within which an act is required to be done.

An award was made on the 28th of March, 1877. An application to set it aside, under 9 and 10 Wm. 3, c. 15, s. 2, was made in the Easter sittings on a day after the 8th of May. Easter Term in 1877, under the former procedure, would have begun on the 15th of April and ended on the 8th of May:—

Held, affirming the judgment of the Queen's Bench Division, that the application ought to have been made on a day before the 8th of May, for "terms" still exist as a measure for determining the time within which an award should be set aside under 9 & 10 Wm. 3, c. 15, s. 2.

AN award was made on the 28th of March, 1877, and the submission having been duly made a rule of Court, a motion for an order to set aside the award was made on behalf of the governors of the College of Christ, on a day after the 8th of May. Easter Term in 1877, under the former procedure, would have begun on the 15th of April and ended on the 8th of May. The Queen's Bench Division refused to grant the order nisi, on the ground that the application was too late, by reason of 9 & 10 Wm. 3, c. 15, s. 2 (1), which was not interfered with by the Judicature Act, 1873 (36 & 37 Vict. c. 66).

(1) By 9 & 10 Wm. 3, c. 15, s. 2: "Any arbitration or umpirage procured by corruption or undue means shall be adjudged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage before the last day of the next term, after such arbitration or umpirage made and published to the parties."

By s. 26 of 36 & 37 Vict. c. 66: "The division of the legal year into terms shall be abolished so far as relates to the administration of justice, and these shall no longer be terms applicable to any sittings or business of the High Court of Justice, or of the Court of Appeal, or of any commissioners to whom any jurisdiction may be assigned under this Act; but in all other cases in which, under the law now existing, the terms into which the legal year is divided are used, as a measure for deter-

The governors of the College of Christ appealed.

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C. Gould, in support of the appeal. The decision of the Queen's Bench Division is erroneous. The application to set aside the award is not too late, the applicants have the whole of Easter sittings for this purpose. The second section of 9 & 10 Wm. 3, c. 15, requires the application to set aside an award to be made on a day before the last day of the next term after the award is made. By s. 26 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), the division of the legal year into terms is abolished, and there is no longer any "term" applicable to any sitting or business of the Court. The object of this section is to abolish terms; but to retain the name for certain purposes; the judges are to appoint the time for the sittings; that has been done, and the present sittings are longer than the old "terms." The sitting is therefore substituted for the term, and the applicants are at liberty to apply during the whole sitting to set aside the award.

[COCKBURN, C.J. The sittings are not substituted for the terms: they are a new creation. By sect. 26 the old terms are kept alive for some of the old purposes: they are abolished so far as relates to the administration of justice, that refers to the sitting and business of the High Court of Justice.]

If the sittings are not substituted for the old "terms" an award made under a compulsory reference by virtue of the Common Law Procedure Act, 1854, in many instances could not be set aside. By sect. 9 of that Act the application to set aside the award would have to be made within the first seven days of the term next following the publication. Now, under 11 Geo. 4, and 1 Wm. 4, c. 70, s. 6, Trinity Term commenced on the 22nd of May, and ended on the 12th of June. The first seven days of Trinity Term would therefore have been from the 22nd of May, to the 28th of May. By Order LXI., Rule 1, Trinity sittings commence on the Tuesday after Whitsun week. If Whit Sunday were to fall on the 22nd of May, the sittings would commence on the 31st of May. The period from Friday, the 20th of May

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mining the time at or within which any act is required to be done, the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority."

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to the 31st of May would be vacation after Easter sittings. Consequently the first seven days of Trinity Term would fall in vacation after Easter sittings. There are other days in which Whit Sunday might fall which would give the same consequence. In such cases the award could never be set aside. If sittings are substituted for terms no such difficulty would arise.

COCKBURN, C.J. We cannot interfere. I feel all the inconvenience that may result from the operation of sect. 26, but I think it is a casus omissus which we cannot cure. Sect. 26 relates in the first place to the ordinary administration of justice, which used to be performed in periods called terms, and which now depends on certain periods called sittings. We have power to make rules, but we have not the power to alter an Act of Parliament. There is an Act of Parliament, not affected by this recent legislation, which prescribes the period at which an application must be made for setting aside an award. It refers to that particular period called "a term" which is abolished except for certain special purposes. But among these special purposes is such an application as the present. For this is one of the cases in which the terms, into which the legal year was divided before the Judicature Acts, were used as a measure for determining the time at which an act should be done; and therefore the term may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by proper authority. But no such provision has been made, and therefore terms still exist, as a measure for determining the time at which an award under 9 & 10 Wm. 3, c. 15, should be set aside. This may lead to considerable conflict between the two modes of reckoning "terms" and "sittings;" and I hope something may be done to prevent hardship to suitors. The application to set aside the award ought to have been made before the last day of what was called the term. I think the decision of the Queen's Bench Division was right.

JAMES, BRAMWELL, and BRETT, L.JJ., concurred.

Appeal dismissed.

Solicitors for governors of the College of Christ: *Dobinson, Geare, & Son.*

[IN THE COURT OF APPEAL.]

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Nov. 7.

HUNT *v.* THE CITY OF LONDON REAL PROPERTY COMPANY.

Practice—Application for New Trial—Action commenced in Chancery Division—Divisional Court—Rules of Court, Order XXXVI., Rule 29*a* (*Dec.*, 1876)—*Order XXXIX., Rule* 1 (*Dec.*, 1876)—*Order by Chancery Judge directing trial in Middlesex.*

Where an action attached to the Chancery Division has been tried by a jury before a judge of one of the Common Law Divisions, application for a new trial must be made to a Divisional Court.

Where an action attached to the Chancery Division is to be tried by a jury, and, no place of trial being named in the statement of claim, the action is set down to be tried in the County of Middlesex, no special order of the judge of the Chancery Division, stating the reason why it should be so tried, is necessary.

THIS action, which related to the title to a strip of land, and a wall round it, situate in the City of London, was commenced in the Chancery Division, and was attached to the Court of Hall, V.C.

The defendants gave notice to have the action tried before a judge and jury, and, no place of trial having been named in the statement of claim, it was set down for trial in the general list of actions for trial at the Middlesex sittings. It came on for trial before Cockburn, C.J., on the 13th of July, 1877. His Lordship refused to try it, on the ground that no order had been made by the Vice-Chancellor under the Rules of Court, Order XXXVI., Rule 29a (Dec., 1876), stating the reason why it was expedient that it should not be tried in the Chancery Division.

Application was then made to Hall, V.C., who, on the same day, made an order that the action should be tried before a jury in a Common Law Division "on the ground that it was a proper case for a jury, and that his Lordship had not the power to summon one." The case was then mentioned again to Cockburn, C.J., on the 14th of July. His Lordship was of opinion that the reason stated by the Vice-Chancellor in his order did not shew a sufficient ground for sending the case to be tried out of the Chancery Division, as he thought that the Vice-Chancellor had himself power to summon a jury. But out of respect to the Vice-Chancellor, his Lordship, after consulting with Field, J., consented, under

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protest, to try the action. Ultimately, the case was tried before Field, J., with a jury, and a verdict was found for the plaintiff, but no judgment had yet been delivered by the judge.

On the 2nd of August, 1877, the defendants moved before a Divisional Court, consisting of Kelly, C.B., and Field, J., for an order nisi for a new trial, on the ground of misdirection by the judge, and of the verdict being against the weight of the evidence. The Court refused to hear the application, on the ground of want of jurisdiction. (1)

The defendants appealed from this decision, and the Court of Appeal adjourned the hearing of the appeal till after the Long Vacation.

B. B. Rogers, for the defendants. The Divisional Court refused the application of the defendants on the ground that they had no jurisdiction to entertain it, and that the defendants ought to apply to the judge who tried the action. But that decision was based upon an erroneous interpretation of the Rules of Court. The original rule in the Rules of the Supreme Court, 1875, regulating the practice, was Order XXXIX., Rule 1, which was as follows: "A party desirous of obtaining a new trial of any cause *tried in* the Queen's Bench, Common Pleas, or Exchequer Divisions, on which a verdict has been found by a jury, or by a judge without a jury, must apply for the same to a Divisional Court, &c." This order applied equally to actions attached to the Chancery Division as to those commenced in the three Common Law Divisions; because all actions attached to the Chancery Division which are to be tried by a jury have to be *tried in* one of the three Common Law Divisions: *Warner* v. *Murdoch*. (2) In cases where a special order is necessary for that purpose under Order XXXVI., Rule 29a (Dec., 1876), the Chancery judge has to state the reason why it is desirable that it should not be tried in the Chancery Division; but, acccording to a dictum of Bramwell, L.J., in *Warner* v. *Murdoch* (3), in ordinary cases, where no place of trial is named by the plaintiff in his statement of claim, and the judge does not desire the action to be tried at a particular place, but "the action

(1) 2 Q. B. D. 605. (2) 4 Ch. D. 750.
(3) 4 Ch. D. at p. 756.

goes of its own accord, so to speak, to be tried at the Middlesex sittings," no special order from the Chancery judge is necessary. That was the case in the present instance.

[JESSEL, M.R. As you refer to what was said by Bramwell, L.J., as a mere dictum I think it right now to say that we are all of opinion, and now decide, that in this case no such order of the Vice-Chancellor was necessary.]

By the new rule of December, 1876, which is substituted for Rule 1 of Order XXXIX., it is provided that "where in an action in the Queen's Bench, Common Pleas, or Exchequer Divisions there has been a trial by jury, any application for a new trial shall be to a Divisional Court. And where the trial has been by a judge without a jury the application for a new trial shall be to the Court of Appeal." In this rule the words "tried in" are left out; but it is clear that it must have been intended to be co-extensive with the rule for which it was substituted, and to include actions commenced in the Chancery Divisions. The object of the new rule was to make a difference between jury trials and trials without a jury, and not between actions attached to the Chancery Divisions and those attached to the other Divisions. If this construction is not correct there is no provision for applications for a new trial in the case of Chancery actions.

JESSEL, M.R. I think that the Divisional Court was the proper Court to hear this application. It is quite true there has been a change in the language of the Order XXXIX., Rule 1. I have no right to import any personal knowledge of my own, but it appears obviously on the face of the order that the variation was a mere accidental change in language on the part of the draughtsman. The original order was this: "A party desirous of obtaining a new trial of any cause tried in the Queen's Bench, Common Pleas, or Exchequer Divisions on which a verdict has been found by a jury or by a judge without a jury, must apply for the same to a Divisional Court." Then the substance of the new order was to make a distinction between the two cases of a trial before a jury and a trial before a judge without a jury. That was the extent of the alteration, and it is carried out by the altered order. Unluckily—I use the word because it has led to a difference

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of opinion between this Court and the Divisional Court—the words "tried in" were left out, I suppose, for the sake of supposed conciseness, and it now stands "an action in." Now, what does "an action in" mean? It may mean one of two things; it may mean "tried in," or it may mean an action "attached to" the Division. In the original rule the former was meant. There is no reason to be suggested why the expression in the new rule should mean anything else; and I am of opinion that it still means "tried in," and consequently this action being tried in the Queen's Bench Division, that is, before a judge of that Division, though not attached to the Division by actual transfer, the proper Court to go to was the Divisional Court.

There is only one other reason which I think I ought to add, and that is the reason of convenience. It would be manifestly most inconvenient to have different modes of obtaining new trials, depending upon the name of the Division to which the action happened to be attached. There can be no grounds that I know of for any such distinction, and I do not think that a fair interpretation of the rules leads to such a distinction.

I am, therefore, of opinion that the Divisional Court ought to have entertained this application. With this intimation of opinion, the applicants may apply again to the Divisional Court, and if the Divisional Court should consider that they cannot now entertain the application by reason of the prior refusal, then they may apply to the Appeal Court on the merits for an order nisi for a new trial.

BAGGALLAY, L.J. I am of the same opinion. I think it not an immaterial circumstance that unless the construction of this rule is that which has been put upon it by the Master of the Rolls, there is no provision in the rules whatever for obtaining a new trial of an action from the Chancery Division tried by one of the judges of the Common Law Division.

THESIGER, L.J. I am of the same opinion. One can see plainly the main object which the judges had in view in the change of the original rule, namely, that where there had been a trial before a judge without a jury—where the judge was the person who had the whole cause of action before him—it was thought inconvenient

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that there should be an appeal from him to the Divisional Court and then a further appeal to the Appeal Court. On the other hand it is difficult to see any object for the passing of a rule, that when the action had been commenced in the Queen's Bench, Common Pleas, or Exchequer Division, the motion for a new trial should be made in the Divisional Court; but that where the action had been commenced in the Chancery Division, although tried in the same manner as an action in the Common Law Division, the motion should be made in a different way. I also concur with what Lord Justice Baggallay has said, that unless we adopt this construction of the present rules one cannot find any provision under which there could be a new trial of an action commenced in the Chancery Division. (1)

Appeal allowed.

Solicitors: *Tathams & Pym.*

PONTIFEX *v.* THE MIDLAND RAILWAY COMPANY.

Nov. 22.

Costs—County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 5—"*Action founded on Contract or on Tort.*"

The statement of claim alleged that the plaintiff, as vendor of goods, delivered them to the defendants, a railway company, as carriers for reward, the goods being consigned to the intending purchasers: that afterwards, and before the goods had been delivered to the consignees or claimed by them from the defendants, the plaintiff discovered that the consignees were insolvent, and, as unpaid vendor, gave notice to the defendants not to deliver the goods to the consignees, but to hold them to the plaintiff's order, and before the goods were delivered to the consignees the plaintiff required the defendants to re-deliver them to him: that the defendants refused to do so, and delivered them to the consignees, who absconded without paying for the goods. The plaintiff claimed their value, viz., 12*l.* 16*s.* 6*d.* as damages. The defendants paid that sum into court, and the plaintiff took it out in satisfaction:—

Held, that the action was "founded on tort," and not "on contract" within s. 5 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), and that the plaintiff having recovered a sum exceeding 10*l.* was not deprived of costs by that section.

THE statement of claim contained the following allegations:—

1. The plaintiff is a merchant carrying on business in London.

(1) Nov. 22, 1877. On this day the defendants renewed the application before the Divisional Court, consisting of Cockburn, C.J., Mellor and Lush, JJ. The Court granted an order nisi.

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2. On the 27th of October, 1875, the plaintiff delivered to the defendants, and the defendants received from the plaintiff as the vendor, certain goods, namely, three casks of composition pipe, as carriers thereof, for reward to them in that behalf, consigned by the plaintiff to Henry Winfield & Co., Birmingham, the intending purchasers.

3. The plaintiff subsequently, and before any of the goods had been delivered to Winfield & Co. pursuant to the said consignment, and before they had claimed delivery of the same from the defendants, discovered that Winfield & Co. were in insolvent circumstances, and thereupon, on the 22nd of November, 1875, none of the goods having been then paid for, he, as unpaid vendor, gave notice to the defendants not to deliver any part of the goods to Winfield & Co., but to hold them to the plaintiff's order, and before any of them were delivered to Winfield & Co., the plaintiff required the defendants to re-deliver the same to him, but they refused and neglected to do so, and contrary to and after they had received the plaintiff's notice and order, they, on the 17th of December, 1875, delivered them to Winfield & Co.

4. Shortly after Winfield & Co. had so got possession of the goods, they closed their house of business at Birmingham and absconded, and the plaintiff does not know where they are now to be found.

5. The plaintiff has never been paid for any part of the goods, and by reason of the defendants' default in delivering them to Winfield & Co., notwithstanding the notice and order given to them by the plaintiff, he has wholly lost the goods and the price and value thereof, namely, 12*l.* 16*s.* 6*d.*

The plaintiff claimed 12*l.* 16*s.* 6*d.* damages.

The defendants having paid into court the amount claimed, the plaintiff took it out in satisfaction. The master having taxed the plaintiff's costs, the taxation was set aside by Lopes, J., at chambers, on the ground that the plaintiff had recovered a sum not exceeding 20*l.* in an action "founded on contract," within 30 & 31 Vict. c. 142, s. 5, the County Courts Act, 1867.

July 9. *Crump*, for the plaintiff, moved to rescind the order of Lopes, J. The action is founded on tort. The stoppage in

transitu and the notice to the defendants not to deliver to Winfield & Co., revested the property in the goods in the plaintiff, and after that any act of interference with the plaintiff's right to the goods is a conversion, for which an action of trover lay under the old system. The plaintiff had the right of immediate possession. The possession of the defendants was the possession of the plaintiff. After the notice had been given the contract of carrying was ended, and the defendants refused to enter into any other contract. An action against common carriers, for not safely delivering goods intrusted to them as common carriers, always was an action founded on the breach of their common law duty, independently of contract, within the meaning of the County Court Acts: *Tattan* v. *Great Western Ry. Co.* (1) *Baylis* v. *Lintott* (2) is not in point, for the action was for breach of contract, and was expressly so framed, and no action on the case would have lain.

W. G. Harrison, Q.C., for the defendants. *Tattan* v. *Great Western Ry. Co.* (1) was a decision upon 19 & 20 Vict. c. 108, where the words were "where an action *of contract* is brought." It was to remedy the anomalous state of things pointed out in that case by Cockburn, C.J., that in framing the statute now in question, the County Courts Act, 1867, 30 & 31 Vict. c. 142, s. 5, the larger words were used—"an action founded on contract"—so as to include actions which arise out of contract. In the present case there is an express contract to deliver to Winfield & Co., and, in case a right to stop in transitu occurs, there is a further implied contract to deliver to any other person whom the consignor may name. This is the real right claimed, and it is based on contract. No relations arose between the plaintiff and defendants independently of contract. In *Tattan* v. *Great Western Ry. Co.* (1) the declaration was framed as an action on the case, and the decision went on that ground. That case was reflected on in *Baylis* v. *Lintott* (2), where the Court preferred to follow *Legge* v. *Tucker* (3), which was an action against a livery stable-keeper for negligence in the case of a horse delivered to him, and the Court held it was an action of assumpsit, and not on the

(1) 2 E. & E. 844; 29 L. J. (Q.B.) 184. (2) Law Rep. 8 C. P. 345.
(3) 1 H. & N. 500; 26 L. J. (Ex.) 71.

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case, within 13 & 14 Vict. c. 61, s. 11, there being no duty independently of the contract. That case governs the present.

Crump, in reply. The contract of carriage was made by the plaintiff only as an agent for the purchaser, and there was no contract between the plaintiff in his own right and the defendants. "A bailee is liable in trover if he delivers to the wrong person:" Benjamin on Sales (2nd ed.), p. 719.

Cur. adv. vult.

Nov. 22. The judgment of the Court (Cockburn, C.J., and Cleasby, B.) was read by

COCKBURN, C.J. In this case there was a statement of claim by which the plaintiff claimed 12*l.* 16*s.* 6*d.* The defendant paid that sum into court, and the plaintiff took it out in satisfaction.

The question is, whether the plaintiff is entitled to recover his costs. His right to them is regulated by 30 & 31 Vict. c. 142, s. 5, by which it is enacted that if the plaintiff in an action in the superior Courts "shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort," he shall not be entitled to any costs unless he has a certificate of the judge, or an order of the Court.

The amount recovered in this case being 12*l.* 16*s.* 6*d.* it follows that if the action is founded on tort the plaintiff is entitled to costs, if on contract he is not so entitled. Formerly, when there were forms of action, there would have been little difficulty in determining whether an action was founded on contract or tort, but now that the claim is made by a narration of facts, it does not always clearly appear to which class, contract or tort, the case properly belongs. Effect, however, must be given to the distinction made by the Act of Parliament.

If there is an express contract, and the act complained of is a breach of it the action is clearly founded on contract; if there is no contract at all, but the act is an unauthorized intermeddling with property, it is clearly founded on tort; but the difficulty arises in a case like the present, where there is undoubtedly an unauthorized intermeddling with property, but the act is connected with a contract originally entered into, and there is ground for

regarding it as founded on that contract, or some new contract implied from the circumstances.

The facts of the present case are that the plaintiff had agreed to sell a quantity of composition pipe to H. Winfield & Co., and had delivered them to the defendants as carriers, consigned to the purchasers. This appears from the statement in paragraph 2 to be the ordinary case of delivery to a carrier for a purchaser, and when that is the case, unless other circumstances appear, it is regarded as a contract made on behalf of the consignee by the consignor as his agent. (See what is said by the judges in *Cork Distilleries Co.* v. *Great Southern and Western Ry. Co.* (*Ireland*) (1), and by the Lord Chancellor. (2))

It further appears by paragraph 3 that Winfield & Co. becoming insolvent, the plaintiffs stopped the goods in transitu. The effect of this was, no doubt, to put an end to the contract of carriage, and to revest the property in the plaintiff. The plaintiff afterwards gave notice to the defendants to hold the goods to his order, but the defendants notwithstanding delivered the same afterwards to Winfield (paragraph 3). Under these circumstances, it may no doubt be said that the claim of the plaintiff arose out of the original contract of carriage, and was in that way founded on contract. But it appears to us that the words "founded on contract" mean directly founded on contract, and not remotely, as in the present case. In reality what the defendants did was to perform the original contract of carrying, which they had no right to do after the stopping in transitu. The contract was put a stop to by an unusual and unexpected event, the stopping in transitu, and the question really becomes whether that event placed the plaintiff and the defendants in the relation of parties contracting with each other, or in the relation which exists where one person is, without any intention to be so, in the possession of the property of another.

In the present case the plaintiff gave notice to the defendants to hold the goods to his order. If they had agreed to do so there would have been a contract; but they refuse to do so, and deliver the goods to the purchaser. It appears to us that the claim of the plaintiff is not founded on any existing contract between him and the defendants, but on the wrongful act of the defendants in

(1) Law Rep. 7 H. L. at p. 277. (2) At p. 278.

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delivering the goods as they did. The contract of the defendants was to carry and deliver. But under the circumstances which arose, the law gave the plaintiff the right to put an end to that contract and to demand back the possession of the goods, and he did so. From that time the retention of the goods and the dealing with them by the defendants became tortious.

And this agrees with the view which was always taken of such a case when the action of trover existed. For such a misdelivery after notice was always treated as a wrongful conversion. The statute in using the words "founded on tort" may be fairly regarded as having reference to such cases as were at the time always treated as cases of tort.

Order absolute.

Solicitors for plaintiff: *J. & M. Pontifex.*
Solicitors for defendants: *Beale, Marigold, & Beale.*

Nov. 17.

[CROWN CASE RESERVED.]

THE QUEEN *v.* ROGERS.

Embezzlement—Venue.

A clerk whose duty it was to remit at once to his employers in Middlesex all moneys collected by him as their clerk, collected at York, on the 18th of April, a sum of money as such clerk, but never remitted any portion of it. On the 19th and 20th of April he wrote and posted from places in Yorkshire to his employers in Middlesex letters making no mention of the money so collected, and on the 21st of April he wrote and posted at Doncaster in Yorkshire to his employers in Middlesex a letter which was intended to make them believe that he had not then in fact collected the money in question. These letters were duly received by the employers in Middlesex:—

Held, by Kelly, C.B., Field, Lindley, and Manisty, JJ., that the receipt of the letter of the 21st of April in Middlesex was sufficient to give jurisdiction to try the prisoner in Middlesex.

Held, by Huddleston, B., contrà, that no part of the crime was committed in Middlesex, and that the prisoner was wrongly indicted in that county.

CASE stated by the assistant judge of the Middlesex Sessions.

The prisoner was tried on an indictment which charged him with having, when he was employed in the capacity of clerk or

servant to Middleton, Chapman, and another, embezzled the sum of 10*l.* 17*s.* 6*d.* received by him on their account.

The prisoner was employed by the prosecutors, who carry on business under the style of Chapman, Son, & Co., at Charterhouse Buildings, London, as their country traveller. It was part of his duty to collect outstanding accounts, and as to all moneys he might receive, to remit them at once to his employers in London, either by post-office orders, or bankers' drafts.

On the 12th of April, 1877, when he was starting on his first journey, a list, of which the following is a copy, was handed to him, and he was requested to collect the accounts therein specified:—

List of accounts received from customers on account of Chapman, Son, & Co., for week ending April 14th, 1877, by Mr. E. G. Rogers.

	£	*s.*	*d.*
(1.) James Wood & Co, York . .	2	7	6
(2.) T. & H. Chapman, York . .	11	3	6
(3.) Thomas Kidd, Hull . . .	6	16	0
(4.) T. W. Carr, Scarboro' . . .	1	3	6

At the foot of this list there was a printed note as follows:—

"All moneys received as above must be remitted to the firm at once, and this list returned with the balance in hand at the end of each week."

Mr. M. Chapman, one of the prosecutors, drew the prisoner's attention to this note, and desired him under no circumstances to mix up moneys collected from customers with his expenses. 10*l.* was then paid him in advance for his travelling expenses.

On Wednesday, the 18th of April, the prisoner, being then at York, received there from Messrs. T. & H. Chapman 10*l.* 17*s.* 6*d.* cash in discharge of the account No. 2 in the above list. He never accounted to his employers for this money, or informed them that he had received it, and under the present indictment he was charged with having embezzled it. It appeared that on the same day that he was paid this account he received from the prosecutors a second sum of 10*l.* towards his travelling expenses, and a third sum of 10*l.* was remitted to him for these purposes on

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the 24th of April. On the 19th and 20th of April he was at Hull, and while there he wrote three letters to them, but he remitted no money, and in neither of these letters is there any reference to the account which had been paid to him by Messrs. Chapman of York. On Saturday, the 21st of April, the prisoner was at Doncaster, and there he wrote again to the prosecutors. All these letters were addressed to them at Charterhouse Buildings, in the county of Middlesex, and were there received by them through the Post Office. In his letter from Doncaster of the 21st of April, after referring to Kidd's account (No. 3 in the above list), as to which he said Kidd had promised to remit the amount, the prisoner wrote as follows, "I have only two other accounts with which I have been furnished with statements to collect, before I arrived in Scarborough, which, as I shall have to go through York, will attend to and remit you in due course."

The above list of accounts being the only statement that had been furnished to him, and the account due from Kidd having been specially mentioned in a former part of this letter, it is obvious that one of "the only two other accounts" to which the prisoner here referred was T. & H. Chapman's account (No. 2), which, in point of fact, he had already received. Other letters and telegrams passed between the prisoner and the prosecutors, to which it is unnecessary for the present purpose to advert. On the 2nd of May the prisoner was arrested at Newcastle. He was brought thence to London, and committed at Bow Street for trial upon the present charge at the Middlesex Sessions. When arrested he had only 4*l.* 6*s.* 7*d.* in money in his possession.

Upon the above facts it was contended on behalf of the prisoner that the indictment failed of proof, the embezzlement, if embezzlement there was, having been committed in the county of York, where the money was received, and appropriated by him, and not in the county of Middlesex, it having been the prisoner's duty to account and remit the amount "at once." On the other hand, the counsel for the Crown contended that the venue was well laid in Middlesex, inasmuch as the prisoner's letter of the 21st of April amounted virtually to a denial in this county of the receipt of the money, that letter having been addressed by him to Charterhouse Buildings, London, and there received by his employers

through the Post Office. Having doubts upon the question thus raised I refused to direct an acquittal, and said I would reserve the question of venue for the Court of Appeal. I therefore left the question of embezzlement to the jury, irrespective of venue, but with regard to the alleged denial in Middlesex, I requested them to say whether in their opinion the prisoner intended that the prosecutor should understand from the aforesaid statements contained in his said letter of the 21st of April, that he had not yet received the amount due from Chapman's of York, and had thus in effect rendered a wilfully false account. The jury found the prisoner guilty, and answered these questions in the affirmative. I postponed sentence pending the decision of this case. The question reserved is, whether under the circumstances above disclosed, the venue was well laid in Middlesex. If the Court should be of opinion that it was, the conviction to stand; if of the contrary opinion, to be quashed.

The learned assistant judge also referred to the cases of *Reg.* v. *Murdock* (1) and *Reg.* v. *Davison.* (2)

No counsel appeared for the prisoner.

Besley, for the prosecution. The receipt of the letter of the 21st of April by the prisoner's masters in the county of Middlesex, gave jurisdiction to try the prisoner in Middlesex. That letter has been found to amount to a false accounting by the jury, and it completes the crime of embezzlement. Embezzlement is a crime which is not complete until the servant has failed to remit and account to the master. The completion, then, of the crime took place in Middlesex. The case of *Reg.* v. *Leech* (3) shews that, in the case of the crime of obtaining money by false pretences, the receipt of a letter containing the false pretences in the county where the trial takes place is enough to give jurisdiction, though the prisoner wrote and posted it in another county. *Rex* v. *Hobson* (4) is an authority to shew that the prisoner in the present case could have been legally tried either in Middlesex or in Yorkshire. In *Reg.* v. *Murdock* (1) Parke, B., says that

(1) 2 Den. C. C. 298; 21 L. J. (M.C.) 22; 5 Cox. C. C. 360; 16 Jur. 19.

(2) 7 Cox. C. C. 158.

(3) 7 Cox C. C. 100; 25 L. J. (N.S.) 77; 1 Dears. C. C. 642; 4 W. R. 482.

(4) Russ. & Ry. 56; 1 East. P. C. Add. xxiv.; cited in 2 Leach. 975.

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"the prisoner's not returning and accounting to his master in Nottingham," as it was in that case his duty to do, "was equivalent to embezzlement in Nottingham."

[HUDDLESTON, B., referred to the judgment of Maule, J., in *Reg.* v. *Murdock.* (1)]

Reg. v. *Davison* (2) was not a case of master and servant, but of an offence under the Bankruptcy Acts then in force. In that case there was no overt act done in England; nothing took place in England except the failure by the prisoners to account, and that is not an act. There was no false accounting, whilst in the present case the letters were sent into Middlesex by the prisoner, who thereby completed the crime. *Rex* v. *Taylor* (3) is also an authority in favour of the prosecution in this case.

KELLY, C.B. I am clearly of opinion that this conviction should be affirmed. The prisoner is charged with having, when employed in the capacity of clerk or servant to Messrs. Chapman, Son, & Co., embezzled the sum of 10*l.* 17*s.* 6*d.*, received by him on their account. Upon the evidence, as set out in the case stated for the opinion of this Court, it was the duty of the prisoner to collect outstanding accounts, and as to all moneys he might receive to remit them at once to his employers in Middlesex, either by post-office order or bankers' drafts. He received in York, on account of his employers, the sum of money, with the embezzlement of which he was charged, and it might, if there were no further evidence in the case, be said that in not remitting the money from that place, and at once, he afforded evidence fit for the consideration of a jury of an embezzlement in the county of York. The case, however, did not rest there, and it does not appear whether he received the money at York in cash, or by cheque, or whether it was possible for him to remit it from York, and before leaving York or not. It does, however, appear that shortly after he was at Hull, and that from that place, as also from Doncaster, to which place he seems to have gone on leaving Hull, he wrote to his employers in Middlesex. In these letters

(1) 2 Den. C. C. 298; 21 L. J. (M C.) 22; 5 Cox. C. C. 360; 16 Jur. 19.

(2) 7 Cox. C. C. 158.

(3) 3 B. & P. 596; Russ. & Ry. 63; 2 Leach, 974.

he incloses no remittance; on the contrary, he indirectly or inferentially states by and through them that he has not received the money. In the letter mainly relied upon by counsel the prisoner makes a statement, from which he intends his employers to understand that he had not, in fact, received the amount in question. This letter, as well as the other letters, was sent by post to Middlesex. It may be asked, was the offence complete by the mere writing of the letter? I am not prepared to say that it might not be, and I am not prepared to say that the prisoner could not have been tried in Yorkshire. I can, however, say that I am clearly of opinion upon the authority of the cases cited, and upon that of *Rex* v. *Burdett* (1), that the offence was in this case completed in Middlesex, and that the prisoner was well indicted, and well tried in that county. The case of *Rex* v. *Taylor* (2) and the case of *Reg.* v. *Murdock* (3) affirm in reality the same proposition, and support the view which we take in this case.

FIELD, J. I am of the same opinion. I think that a material part of the offence charged in the indictment was committed in Middlesex. In order to ascertain what offence the prisoner has in fact committed, and where he has committed such offence, we must first ascertain what it was his duty as a servant to do, and when and where it is shewn that he violated it so as to have committed the crime of embezzlement.

Now it was not his duty to hand over to his employers the specific money he received, but he was "at once" (which means, within a reasonable time) to remit the amount of all moneys he received, and to send with it a list; and this remitting and list were to be forwarded or handed to his employers in Middlesex. In point of fact, he received the money, of which he is charged with the embezzlement, at York on the 18th of April; he then went on to Hull, and from thence he wrote two letters to his employers in Middlesex, in neither of which does he say anything about the money which he had in fact collected at York. Then, on the 21st of April, he wrote a letter which the jury find was

(1) 4 B. & Ald. 95.
(2) 3 B. & P. 596; Russ. & Ry. 63; 2 Leach. 974.
(3) 2 Den. C. C. 298; 21 L. J. (M.C.) 22; 5 Cox C. C. 360; 16 Jur. 19.

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written with intent that the prosecutors should understand that he had not collected the amount which he had so collected, and which letter was intended by him should be received by his employers, and was in fact received by them in Middlesex.

Now, it may be, under these circumstances, that he might have been well tried in Yorkshire, but that is not the question before us. The question before us is, whether there was jurisdiction to try him in Middlesex; in other words, was a material part of the crime committed in Middlesex? Upon this it is to be observed, that the law presumes innocence until guilt is proved. If a complete embezzlement had been proved in Yorkshire, no part of which was committed in Middlesex, a different question would have arisen, but here there is no proof or indication of a complete embezzlement prior to the letter of the 21st of April, in which he gives a false account, shewing that he had at that time committed the embezzlement. The evidence of embezzlement in Yorkshire would have been the writing and posting there of the letters, and the letter of the 21st of April (for it is not necessary to consider the effect of the others) which contained the first evidence of the embezzlement was not only written and posted in Yorkshire, but was addressed to the prisoner's employers in Middlesex, and there received by them, and opened and read, which was intended by the prisoner.

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Now, there is a strong authority to be found, as to the effect to be given to the sending of the letter to Middlesex. In the case of *Evans* v. *Nicholson* (1), the Court regarded a letter as speaking continuously from the moment of its being posted until its receipt by the addressee for the purpose of giving jurisdiction, and the reasoning is in this way: A letter is intended to act on the mind of the recipient, its action upon his mind takes place when it is received. It is like the case of the firing of a shot, or the throwing of a spear. If a shot is fired, or a spear thrown, from a place outside the boundary of a county into another county with intent to injure a person in that county, the offence is committed in the county within which the blow is given. So with a letter. There may in this case have been evidence on which a Yorkshire jury might have convicted the prisoner, but I think there was also

(1) 32 L. T. (N.S.) 778, cited in *Taylor* v. *Jones*, 1 C. P. D. 87.

clearly evidence which justified his conviction by a Middlesex jury. I arrive at this upon principle, and I do not find that the authorities compel me to come to any other conclusion.

No doubt there is a distinction between that which is mere evidence of a crime, and that which is the crime or is part of the crime itself. I quite agree that it is not sufficient that there should be nothing more than evidence of the crime in the county in order to give jurisdiction. Lord Alvanley in the case of *Rex* v. *Taylor* (1) says, "In the present case there can be no doubt. The prisoner being sent over Blackfriars Bridge into the county of Surrey, there received 10*s.* for his master. The receipt of that money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into the county of Middlesex. In cases of this sort the nature of the thing embezzled ought not to be laid out of the question. . . . With respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriars Bridge, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute until he is called upon by his master to account. When called upon by his master to account for the money, the prisoner denied that he had ever received it. This was the first act from which the jury could with certainty say that the prisoner intended to embezzle the money. To apply this case before us: Here a letter amounting to a false accounting is the first act from which, as the case is presented to us, it is possible to say with certainty that the prisoner intended to embezzle the money. That letter was a continuing act until its receipt, and was received in the county of Middlesex. In the case of *Reg.* v. *Murdock* (2), Maule, J., though differing from certain expressions of Baron Parke, does, in truth, look at the matter in the same light. Mr. Justice Maule called

(1) 3 B. & P. 596; Russ. & Ry. 63; 2 Leach. C. C. 976.

(2) 2 Den. C. C. 298; 21 L. J. (M.C.) 22; 5 Cox. C. C. 360; 16 Jur. 19.

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in question the accuracy merely of the statement that the omission to return to Nottingham (as it was the prisoner's duty to do, and there account) was sufficient evidence of embezzlement in Nottingham, without anything more. Mr. Justice Maule, as there appears, thought that some false accounting, or some actual refusal to account, in the county was requisite, and that is furnished in the present case by the letter. The case cited by the Lord Chief Baron, of *Rex* v. *Burdett* (1), is also, to some extent, an authority in favour of our view. I therefore hold that the offence was completed when the prisoner by letter made the false statement to his employers as to the receipt of the money, and that he was rightly tried in Middlesex.

HUDDLESTON, B. I have the misfortune to differ in this case from the rest of the Court. I am unable to persuade myself that I am wrong, and consequently I feel it to be my duty to give my opinion, and to state my reasons for forming that opinion. It can hardly be that my opinion, being in opposition to my learned Brethren, is correct; but it is my opinion, and I feel bound to give utterance to it. Embezzlement was not larceny at common law, and it was well laid down in East's Pleas of the Crown, vol. 2, ch. xvi., s. 16, that if "the servant have done no act to determine his original lawful and exclusive possession, as by depositing the goods in his master's house or the like; although to many purposes and as against third persons this is in law a receipt by the master, yet it has been ruled otherwise in respect of the servant himself upon a charge of larceny at common law in converting such goods to his own use; because as to him there was no tortious taking in the first instance, and consequently no trespass;" for without a trespass there could be no larceny. In the second volume of Russell on Crimes and Misdemeanours, 5th ed. p. 134, the same principle is laid down. The offence of embezzlement was created a felony by statute. In the last of these, 24 & 25 Vict. c. 96, s. 68, the offence is thus defined: "Whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be delivered to, or received,

(2) 4 B. & Ald. 95.

or taken into possession by him for, or in the name, or on the account of his master or employer, or any part payment thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer, otherwise than by the actual possession of his clerk, servant, or other person so employed, and being convicted thereof shall be liable at the discretion of the Court, &c." What then is the act of embezzlement? It is the stealing by the clerk or servant, or person employed as defined by the section, of the money, &c., of the master. The act of stealing is the crime. The fraudulent omission to account, or false statement, is the evidence from which a jury may infer that the prisoner has stolen the money received by him, and has committed the crime. The duty of the servant is found by the case to be to remit the money collected "at once" to his employers; not, as I read the case, to remit in the course of a week, but to remit at once, although the list given to him was to be returned with the balance in hand at the end of the week. This the prisoner did not do, but appropriated the money before his arrest at Newcastle, as appears from the case with tolerable clearness. On the 18th the prisoner receives the money in question. Then on the 19th, and again on the 20th, he writes to his employers without accounting and without remitting. He ought in these letters, he ought in the first even of these letters, to have accounted and remitted to his employers. There was then on the 19th and on the 20th good evidence that the prisoner had embezzled the money. As to the letter of the 21st, there is an express finding of the jury that he intended by that letter that his employers should understand that he had not then received the amount in question at York. There was, therefore, conclusive evidence to shew that before he posted the letter of the 21st of April he had embezzled the money. Whether he had, as I think, embezzled it before sending the letter of the 19th, is not material in my view of the case, though there was, I think, evidence of it. But the evidence of an embezzlement before the posting of the letter of the 21st to his employers in Middlesex was of the strongest, and proved an embezzlement not in Middlesex but in Yorkshire. The false statement intended to act on his em-

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ployers' minds was complete when he posted the letter containing it in Yorkshire. Suppose the letter had never reached its destination, the prisoner's crime would not have been less; he still would have embezzled, though some of the evidence of his crime would then have been lost. So, too, if the letter had been returned to the prisoner, and found upon him some days after, the evidence would have been complete of an embezzlement before the 21st. I am, I think, supported by the reported cases in the conclusion at which I have arrived. First, as to the cases of libel and false pretences, I dismiss them as not being in point. I distinguish the case of libel from the case of embezzlement, because a libel is no offence till published; there is no crime until the defamatory writing is made public. Publication is part of the offence, consequently the charge may be dealt with in the county or place where publication takes place. Similarly as to the crime of obtaining money or property by false pretences, the offence is not complete till the pretence is made to some one. In the case of a false pretence contained in a letter, the offence is not complete until the letter is received by the person to whom the false pretence is intended to be made. The case of *Reg.* v. *Leech* (1) supports this view, as to false pretences. It has no reference to the offence of embezzlement at all. *Rex* v. *Burdett* (2) again was a case of libel. In the case of *Rex* v. *Hobson* (3), the prisoner came into Staffordshire, and there denied that he had received money in the county of Salop, and the question was, whether the denial so made to his master in the county of Stafford prevented him from being legally convicted in Salop, and the decision was that it did not. The majority of the judges held that the indictment might be in Salop, where the prisoner received the money, and where he might, as appeared from the evidence, have embezzled it. In *Rex* v. *Taylor* (4) Lord Alvanley, in giving judgment, speaking of *Rex* v. *Hobson* (3), says that there was in that case sufficient evidence of a beginning to embezzle in Salop to make the offence triable in that county, as

(1) 7 Cox, C. C. 100; 25 L. J. (M.C.) 77; 1 Dears. C. C. 642; 4 W. R. 482.

(2) 4 B. & Ald. 95.

(3) Russ. & Ry. 56; 1 East, P. C. Add. xxiv.

(4) 3 B. & P. 596; Russ. & Ry. 63; 2 Leach. 974.

well as in Staffordshire, where the prisoner was when the fraudulent non-accounting occurred. The statute having made receiving money and embezzling it a larceny, made the offence a felony where the property was first taken, and permitted, therefore, that the offender might be indicted in that, or in any other county, into which he carried the property. In *Rex* v. *Taylor* (1) the receipt of the money was in Surrey, but there was nothing to shew any wrongful misappropriation of it in that county. Lord Alvanley says, in that case, that the receipt of the money was perfectly legal, and that there was no evidence that the prisoner ever came to the determination of appropriating the money to his own use until he came into Middlesex, and denied that he had received the money. Here, the first act was the writing and posting of a letter containing in effect a fraudulent denial of the receipt of the money, and that was in the county of York. The case of *Reg.* v. *Murdock* (2) supports my view strongly; Lord Campbell, C.J., there points out that the jury may have believed that the prisoner in that case brought the money into Nottingham, and even spent the money in Nottingham, the county where he was tried; and Maule, J., says that, in the cases where non-accounting has been held to be sufficient evidence of embezzlement, the prisoner was actually in the county where it was his duty to account, and there completed the offence of embezzlement by omitting, or refusing, to account. "The mere omission to account," says that learned judge (3), "if the prisoner had never returned to Nottingham, would not have rendered him liable to be tried in Nottingham. Suppose that he had gone to Derbyshire, and stayed there six months, and never returned to Nottingham, he would, according to my Brother Parke's view, if apprehended in Derbyshire, have been indictable in Nottingham. I cannot think that that can be so. Some of the cases say that non-accounting is sufficient evidence of embezzlement; but in all these cases the prisoner is in the county where he breaks his duty, and completes the offence of embezzlement by omitting or refusing to account." The case of *Reg.* v. *Davison* (4) is an

(1) 3 B. & P. 596; Russ. & Ry. 63; 2 Leach. 974.

(2) 2 Den. C. C. 298; 21 L. J. (M.C.) 22; 5 Cox, C. C. 360; 16 Jur. 19.

(3) 2 Den. C. C. at p. 301.

(4) 7 Cox. C. C. 159, at p. 162.

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authority which certainly seems almost decisive of the present case. It is there said by Alderson, B., "If the non-accounting was the offence, no doubt the omission took place in England; but the question is, whether the non-accounting is embezzlement;" and the decision shews that the Court there held that, though non-accounting was in many cases evidence of embezzlement, it was merely evidence of the crime, and not the crime itself. Where there is no evidence of fraudulent embezzlement except the non-accounting, the venue may be laid in the place where the non-accounting occurred (that is, of course, if the prisoner was there at the time of the non-accounting), because the jury may presume that there the fraudulent misappropriation was made, but this cannot apply where there is distinct evidence of the misappropriation elsewhere. In *Rex* v. *Hobson* (1) the prisoner denied the receipt of the money which he had received and spent. There was no evidence, however, of where the spending took place, and it might therefore be presumed to be where the receipt was claimed and denied. Coleridge, J., in *Reg.* v. *Davison* (2) says, "Where the act is incomplete, or indifferent in itself, it may be necessary afterwards to make up the deficiency by shewing a non-accounting, but where the misappropriation is once clearly established, the non-accounting could not in any way strengthen the charge." The stealing is the crime, the non-accounting the evidence of it, and as the evidence in the present case shews that the stealing was in Yorkshire, and that the prisoner never was in Middlesex until after he was arrested, I am of opinion that he was not rightly tried in Middlesex.

LINDLEY, J. I am of opinion that this conviction ought to be affirmed. A material part of the offence was committed or took place in Middlesex. I do not mean to say that the prisoner could not have been indicted in Yorkshire, on the contrary, I think he could have been there indicted. The letter of the 21st of April was meant to reach the masters in London. It was a fraudulent failure to account when posted, and it operated as a fraudulent

(1) Russ. & Ry. 56; 1 East, P. C. App. xxiv.
(2) 7 Cox. C. C. 159.

failure to account when received. The case of *Evans* v. *Nicholson* (1) cited by my Brother Field, is an authority in this matter, to shew that the false statement contained in the letter was a continuing act, operating until it reached its destination in Middlesex.

MANISTY, J. I am of the same opinion. The consequences might be most serious if we held the contrary. It would always be a question where the offence took place, where it was completed, whether, when the false statement as to the receipt of the money was made, the money had been squandered. Is it to be allowed for a prisoner to say in defence, "I made a false accounting in Middlesex, but I actually spent the money, I actually misappropriated it elsewhere and long before," or that "I conceived the intention of misappropriating it elsewhere?" In this case there was a fraudulent non-accounting in Middlesex. He was well indicted in that county, although he might also, I think, have been indicted in the county of York. Even the crime of larceny itself can be tried elsewhere than where the actual taking of the goods out of the owner's possession happened, the crime is ambulatory, the continuance of the asportation is a new caption, and a prisoner charged with larceny may be indicted in any county into which he has carried the stolen property.

Conviction affirmed.

Solicitor for prosecution: *W. T. Ricketts.*

(1) 32 L. T. (N.S) 778; cited in *Taylor* v. *Jones*, 1 C. P. D. 87.

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Extradition Act, 1870 (33 & 34 *Vict.* c. 52), *ss.* 2, 6—*Treaty incorporated with and limiting Operation of Act—No British subject to be surrendered—Treaty with Switzerland.*

By the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 2, Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may by Order in Council direct that this Act shall apply in the case of such foreign state, and may, by the same or any subsequent order, limit the operation of the order—and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.

By s. 6, where the Act applies in the case of any foreign state, every fugitive criminal of that state who is in, or is suspected of being in, any part of Her Majesty's dominions,—shall be liable to be apprehended and surrendered in manner provided by this Act.

A treaty having been made between this country and the Swiss government under the above Act, which provided that no Swiss should be delivered up by Switzerland to the government of the United Kingdom, and no subject of the United Kingdom should be delivered up by the government thereof to Switzerland; and an Order in Council having been made, which directed that the Act should apply in the case of the treaty:—

Held, that the treaty must be taken to be incorporated with, and to limit the operation of, the Act, and that no British subject in this country could be surrendered to the Swiss government.

On the return to a writ of habeas corpus to bring up the body of Alfred Thomas Wilson, it appeared that he had been committed to the Middlesex House of Detention, under a warrant of the chief magistrate at Bow Street police office, to shew cause why he should not be surrendered in pursuance of the Extradition Act, 1870, on the ground of his being accused of certain offences within the jurisdiction of the Swiss Confederation, and no sufficient cause having been shewn why he should not be surrendered, he was ordered to be delivered into the custody of the keeper of the House of Detention, there to be kept by him until he should be thence delivered pursuant to the provisions of the Act.

It appeared from the affidavits that the prisoner was arrested and examined before the magistrate, with a view to his extradition to the Swiss government, under the provisions of the Extradition Act, 1870.

By the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 2, "where

an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state.

"Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in, or suspected of being in, the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient. Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement."

By s. 6, "where the Act applies in the case of any foreign state, every fugitive criminal who is in, or is suspected of being in, any part of Her Majesty's dominions,—shall be liable to be apprehended and surrendered in manner provided by this Act."

By treaty between Her Majesty and the Swiss Confederation, dated March, 1874, the contracting parties engage to deliver up to each other those persons who, being accused or convicted of a crime committed in the territory of the one party, shall be found within the territory of the other party under the circumstances and conditions stated in the present treaty. By Article 3, no Swiss shall be delivered up by Switzerland to the government of the United Kingdom, and no subject of the United Kingdom shall be delivered up by the government thereof to Switzerland.

By Order in Council, made February 19, 1875, reciting the Extradition Act, 1870, s. 2, and the above treaty, it was ordered that the Act should apply in the case of the treaty.

At the hearing before the magistrate it was not disputed that the offence with which the prisoner was charged was within the provisions of the treaty, but it was proved that he was a British subject. The magistrate was of opinion that this fact was immaterial, as he was not entitled to consider the terms of the treaty, but only the Extradition Act, 1870, which contained no such limitation as in the treaty, and that the evidence having established a primâ facie case of the prisoner's guilt, he must be committed.

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E. Clarke moved the discharge of the prisoner. The Extradition Act, 1870, must be read in connection with the Order in Council, and the treaty embodied in it. The third article of the treaty, "that no subject of the United Kingdom shall be delivered up by the government thereof to Switzerland," is an exception from the terms of the 2nd section of the Act. [He was then stopped.]

C. Bowen (*H. D. Greene* with him), in support of the warrant of commitment. The Order in Council does not limit the operation of the Extradition Act. It merely recites the treaty in compliance with the provision in s. 2, but the object of this treaty was only to protect the country upon which a demand for the extradition of one of its subjects is made from being compelled to accede to it.

[COCKBURN, C.J. The treaty does not give a discretion. It says no British subject shall be delivered up.]

The language of the treaty ought not to be construed as imperative, and it is most improbable that the legislature meant that it should be the duty of a magistrate to ascertain the law from the text of diplomatic papers. It was only meant that the refusal to deliver up a British subject should not be deemed a breach of the treaty. In making the treaties the two countries contract with each other, they do not legislate for their own subjects.

[FIELD, J. The Crown has power to direct the Act to apply where an arrangement has been made with a foreign state. This must mean an arrangement by treaty.]

It can only mean where an arrangement has been made, without any regard to the terms of the arrangement. The Order in Council applying the Act does not limit its operation. Conditions in a treaty not required by the Extradition Act cannot be taken into account in considering the validity of proceedings under the Act: *Ex parte Counhaye.* (1)

COCKBURN, C.J. I am not sorry that this argument has taken place, for I am chairman of the commission on the subject of extradition, and I will take care that, if possible, this blot upon the law shall be removed, so as to prevent an Englishman who commits

(1) Law Rep. 8 Q. B. 410.

an offence in a foreign country from escaping with impunity. But I cannot entertain a shadow of doubt that in accordance with the special provision in the Extradition Act of 1870, by which Her Majesty may make the treaty, and the application of the Act subject to any terms and conditions that she may think proper: the Order in Council must be co-extensive with, and limited by, the treaty, for otherwise our municipal legislature might be at variance with the terms which the two countries arranged between themselves—a proposition absurd upon the very face of it. I must therefore take it that the Order in Council has embodied the terms of the treaty, and that the Act of Parliament is only applicable so far as it can be applied consistently with the terms and conditions therein contained. Then I find a positive provision that no English subject shall be delivered up under the terms of that Extradition Act. It is not disputed in the present case that the alleged defendant, whose extradition is demanded, is an English subject, and he is therefore clearly within the terms of the treaty, and of the Order in Council which limits the operation of the Act. However much I regret it, the extradition cannot take place, and the prisoner must be discharged.

MELLOR, J. I am of the same opinion. It is a matter of positive bargain between the two countries, and the words of the treaty are free from ambiguity.

FIELD, J. I am of the same opinion. The appellant is in custody, and the person who keeps him returns for cause that he has him in custody under the provisions of the Extradition Act, for the purpose of delivering him up to the Swiss Confederation, to be tried in Switzerland for a crime committed there, and against the law of the Confederation. I fully participate in the regret expressed by my Lord and by Brother Mellor that we should have to put this construction upon the Act and the Order in Council, but it is, of course, better that one criminal should escape from punishment than that a court of law should wrongly construe documents submitted to its decision.

Now assuming that this man is a fugitive criminal, does he come within the terms of the Act which entitle the Secretary of State to deliver such a person to the Swiss government? Does

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the Act apply to him? In one sense it does; but does it apply absolutely to him? In the first place, the Act proceeds upon the fact that there has been some arrangement between this country and a foreign state; and accordingly we find that in this particular case a previous arrangement had been made which is stated in the Order in Council, and yet Mr. Bowen asks us to disregard this arrangement altogether, and to hold that the Act applies in its entirety, although the arrangement itself contains an exception and condition. The Act declares that certain crimes shall or shall not be the subject of extradition. Suppose that by the treaty certain crimes were omitted, could it be contended that, although the Order in Council recited the treaty in terms, yet still the Act applied? But look at the words of s. 2: "Where an arrangement has been made Her Majesty may direct that the Act shall apply in the case of such foreign state." Then "Her Majesty may, by the same or any subsequent order, limit the operation of the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient." Here not only "condition" but the very word "exception" is used. Is there not in this very treaty an exception? It is not that one country shall not be bound to deliver up, but that no subject shall be delivered up to the other country.

Solicitors for prosecution: *Freshfields & Williams.*
Solicitors for defendant: *Wontner & Sons.*

Nov. 19.

HUDSON AND OTHERS *v.* TOOTH.

Prohibition—Public Worship Regulation Act, 1874 (37 & 38 *Vict. c.* 85), *ss.* 7, 8, 9—*Requirement as to Place of Hearing Cause, how far Directory.*

The Public Worship Act, 1874 (37 & 38 Vict. c. 85), s. 7, makes provision for the appointment of a judge of the Provincial Courts of Canterbury and York. By s. 8 a representation under certain circumstances may be made to the bishop of illegal acts or omissions in the performance of the church services, by any incumbent within his diocese; and by s. 9 if the bishop is of opinion that proceedings should be taken on the representation, he shall, if the parties are unwilling to submit to his directions without appeal, transmit the representation to the archbishop of the province, and the archbishop "shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London, or Westminster."

A representation under the above Act was forwarded to the Bishop of Rochester

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charging that T., the incumbent of a parish within the diocese, had been guilty of illegal practices in the conduct of divine service. The bishop transmitted the representation to the Archbishop of Canterbury, and the archbishop thereupon by instrument of requisition required the judge to hear and determine the matter of the representation "at any place in London or Westminster, or within the diocese of Rochester, as you may deem fit." Notice was given to T. that the case would be heard in Lambeth Palace, which, although within the province of Canterbury, is neither in London, Westminster, nor the diocese of Rochester.

In July, 1876, the case was heard at Lambeth Palace in his absence, and he was adjudged to have been guilty of illegal practices, and a monition was made for him to abstain from them. On his non-compliance with the monition, he was pronounced guilty of contempt and imprisoned. From first to last he took no notice of the proceedings, and in no way acquiesced in them:—

Held, that the whole proceeding was void, and a prohibition must be granted, for the word "London" in the requisition could only be construed in its strict sense as the city proper of London, and the judge had no power, under the Act or otherwise, to sit in any place beyond the limits fixed by the archbishop.

RULE obtained at the instance of the Rev. A. Tooth, calling on Lord Penzance, the official principal of the Arches Court, upon notice to him, or the registrar of his court, and also on R. Hudson, S. Gardiner, and R. Gunston, complainants in the case of *Hudson and Others* v. *Tooth* in that court, to shew cause why a writ of prohibition should not issue to prohibit all further proceedings, the matter being one in which there was no jurisdiction.

The facts upon the affidavits were that in February, 1876, the complainants, who were parishioners of St. James, Hatcham, of which Mr. Tooth was incumbent, forwarded a representation under the Public Worship Act, 1874 (37 & 38 Vict. c. 85), s. 7 (1), to

(1) The Public Worship Act, 1874 (37 & 38 Vict. c. 85), s. 7, makes provision for the appointment of a judge of the Provincial Courts of Canterbury and York, and enacts that whenever a vacancy shall occur in the offices of official principal of the Arches Court of Canterbury and the Chancery Court of York, the judge shall become ex officio such official principal.

By s. 8: "If the archdeacon of the archdeaconry, or a churchwarden of the parish, or any three parishioners .... shall be of opinion

"(3.) That the incumbent has .... failed to observe ... the directions contained in the Book of Common Prayer relating to the performance in such church .... of the services, rites, and ceremonies ordered by the said Book ... such archdeacon, &c., may represent the same to the bishop by sending to the bishop a form as contained in Schedule B to the Act."

By s. 9: "Unless the bishop shall be of opinion.... that proceedings should not be taken on the representation .... he shall within twenty-one days after receiving the representation, transmit a copy thereof to the person complained

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the bishop of the diocese (Rochester) charging that Mr. Tooth had been guilty of illegal practices in the conduct of divine service. The bishop transmitted the representation to the Archbishop of Canterbury, and the archbishop thereupon by instrument of requisition required the judge to hear and determine the matter of the representation "at any place in London or Westminster, or within the diocese of Rochester, as you may deem fit." In June, 1876, notice was given to Mr. Tooth, who had been served with the representation, that the case would be heard in Lambeth Palace, in the Public Library, on the 13th of July.

On the 13th of July the case was heard in Lambeth Palace, which, though in the Province of Canterbury, is neither in the city of London, Westminster, or the diocese of Rochester, in Mr. Tooth's absence, and he was adjudged to have been guilty of illegal practices, and a monition made for him to abstain from them. On his non-compliance with the monition further proceedings were taken under which he was pronounced guilty of contempt and imprisoned. He was subsequently released from this imprisonment, but stated that he anticipated that further proceedings would be taken against him to enforce payment of the costs incurred by the complainants. From first to last he made no objection to the jurisdiction and took no notice of the proceedings, and it appeared that he was not aware of the form of the requisition until after his sentence, and shortly before the application for the rule.

On the 12th of July, 1877, the rule above-mentioned was obtained.

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of, and shall require such person, and also the person making the representation, to state in writing, within twenty-one days, whether they are willing to submit to the directions of the bishop touching the matter of the said representation without appeal . . . . and if they shall not within the time aforesaid state their willingness to submit to the directions of the bishop, the bishop "shall forthwith transmit the representation in the mode prescribed by the rules and orders to the archbishop of the province, and the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster," and . . . . the judge shall pronounce judgment on the matter of the representation, and . . . . shall issue such monition (if any) as . . . . the judgment shall require.

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A. J. Stephens, Q.C., for the complainants, and *Benjamin, Q.C.*, for Lord Penzance, shewed cause. First, the hearing at Lambeth Palace was a hearing at "London" within the meaning of the requisition, for the word "London" must be taken to be there used in its popular sense, which includes Lambeth, and not in its strict sense as the city proper of London. The word "city" is not used, and in *Wallace* v. *Attorney General* (1) the Master of the Rolls held that in a bequest to the "hospitals of London" the word "London" could not be confined to the limits of the city. In the Bishopric of Saint Albans Act (38 & 39 Vict. c. 34) the term "South London" is applied to the part of Surrey including Lambeth. Secondly, it was not a condition of the right to try the representation that the judge should sit in one of the places specified in the requisition. The Act 37 & 38 Vict. c. 85, creates no new jurisdiction, but only procedure, and any irregularity in executing it is nothing but an irregularity in procedure, which does not affect jurisdiction.

[COCKBURN, C.J. Does not the Act give the discretion formerly vested in the bishop to the archbishop?]

Sect. 5 saves all jurisdiction existing before the Act. Proceedings are now taken before Lord Penzance as the Dean of the Arches Court of Canterbury. It is well established that if the parties and the subject-matter of a cause are within the jurisdiction, the mode of citing one of the parties is only matter of procedure. Hale, Pleas of the Crown, vol. ii. p. 39, paragraph 23, stating that although sessions are, by the statute of 6 R. 2, c. 5, to be held in the principal towns in the different counties, it had been decided that the justices could at their discretion appoint them to be held elsewhere. *Reg.* v. *Archbishop of Canterbury* (2), though upon a different Act, shews that the citation to appear is a mere matter of procedure. Again, the archbishop had full power to require the judge to hear the case at any place within the province, and the substance of his requisition is to require the judge to hear it within the statutory limits. The place specified is a mere detail. The duties of the archbishop as to naming a place of hearing are ministerial, not judicial. The

(1) 33 Beav. 384; 33 L. J. (Ch.) 314.

(2) 6 E. & B. 546; 25 L. J. (Q.B.) 346.

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condition of the judge's authority is the simple direction to hear the cause, without reference to the place of hearing. The requisition followed the form in the rules which were prepared subsequently to the Act, the word "province" being omitted from this form obviously by accident. But the rule does not supersede the Act. The Court will consider the general intention of the legislature, which cannot be that the non-observance of a formal step in the proceedings shall nullify them altogether. If a strict construction of a regulation would defeat the object of the Act, the law will not hold it to be imperative: *Liverpool Borough Bank* v. *Turner* (1); *Reg.* v. *Castro.* (2) Lastly, assuming that there was an irregularity, the proper course was to apply for relief to the Ecclesiastical Court, or, upon appeal, to the Judicial Committee, instead of applying to this Court after the final conclusion of the proceedings: *Margate Pier Company* v. *Hannam.* (3)

A. Charles, Q.C., and *W. Phillimore*, in support of the rule. The argument that 37 & 38 Vict. c. 85, is merely an Act to modify the existing procedure of the Ecclesiastical Courts is unfounded. The Act creates a new and special jurisdiction, which cannot be enlarged by the fact that the judge has subsequently become official principal of the Court of Arches. If any one of the conditions of the right to exercise this jurisdiction fails, the whole proceeding falls to the ground. Under the former Act 3 & 4 Vict. c. 86, s. 27, any person could institute proceedings, and it was the duty of the bishop, after a presentment from commissioners who formed a kind of grand jury, to hear the cause with three assessors, subject to an appeal to the Dean of Arches; 37 & 38 Vict. c. 85, prescribes an entirely different course. A new judge is appointed, who can only proceed in the manner directed by the Act. The only authority which the Court of Arches ever had to hear a cause was by letters of request from the bishop. Passing on to the particular point before the Court, it will be observed that the bishop has merely to transmit the representation to the archbishop, having no discretion in the matter, and it must be presumed that the archbishop has some

(1) 1 J. & H. 159; 2 De G. F. & J. 502; 29 L. J. (Ch.) 827; 30 L. J. (Ch.) 379.

(2) Law Rep. 9 Q. B. 350.

(3) 3 B. & A. 266.

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duty to perform. The duty undoubtedly is that of issuing the requisition, which is the foundation of the jurisdiction of the judge, and if this requisition is not followed the whole proceeding is void: *Christie* v. *Unwin* (1), where the same principle was held to apply even to the exercise of an authority conferred by statute on the Lord Chancellor. The suggested construction of the word "London" is quite untenable. The word must bear the same construction as it would in any other Act of Parliament, and a decision as to the sense in which the word was used in a will can afford no assistance. As to the objection that there was a remedy by appeal to the Judicial Committee, the right of appeal does not bar the remedy by prohibition: *Burder* v. *Veley*. (2)

6 Q B D 385

COCKBURN, C.J. I think this rule for a prohibition must be made absolute. I say so with very great regret, for the objection is of the most technical character, has nothing to do with the merits of the case, and might have been cured in a moment, if taken at the time, by transferring the hearing of the cause to the other side of the water. Nevertheless, although we see that this is a matter of the purest technicality, yet if the objection taken goes to the root of the jurisdiction, we are bound in the administration of the law to act accordingly.

Now, the form of the requisition to the learned judge before whom this cause came is in the terms that he shall exercise his jurisdiction "at any place in London or Westminster, or within the diocese of Rochester, as he may deem fit." The fact undoubtedly is that the cause was heard and the adjudication made not within the diocese of Rochester, but within the province of Canterbury; the requisition omitting all mention of the province of Canterbury. It was contended in the first place that, although there was an omission of the province of Canterbury as one of the districts within which the jurisdiction of the judge might be exercised, yet London was such a district, and the term "London" must be taken not in its strict but in its popular sense, in which would be included all those precincts which, though not forming part of the city of London or Westminster, are yet so connected with London itself as in popular acceptation to be included

(1) 11 Ad. & E. 373. (2) 12 Ad. & E. 233, at p. 256.

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within that term. I think it is impossible to give that construction to the requisition. Even if the term had been "London" simply, I doubt very much whether it would not have been going much too far to say that the term "London" could be taken in that vague and loose sense in which the precincts of this huge metropolis are now sometimes spoken of as "London." But when I find that "London" is used in contradistinction to Westminster, which, according to the construction suggested by Dr. Stephens, would unquestionably be included in London, my own conviction is, looking at the provisions of the Act and the rules that have been framed under it, that what was intended was that the archbishop, in giving jurisdiction to the judge, should exercise his discretion as to the place in the province at which the hearing of the matter of the complaint should take place. It might not be expedient to try it in the diocese on account of some strong feelings which the matter in dispute might have excited, and therefore it might be advisable to take it to the larger sphere of the province. It might, on the other hand, be desirable to send it to the diocese as the place where all parties lived, the parties complaining and the party complained against, in order that the matter might be adjudicated upon at the least expense, and with the greatest facility and convenience to all parties concerned. It might, on the other hand, be indifferent whether it was tried in the diocese or the province, and the convenience of the judge or the convenience of the parties might suggest that it should be sent to the metropolis. Why are the terms "London" and "Westminster" used? I cannot help thinking because at one time the Court of Arches, the Court of this judge, sat in the city of London. At the time of the passing of the Act it sat in Westminster, but its sittings might be transferred as new courts were built, the sittings might be transferred at one time from Westminster to London, and at another time possibly from London to Westminster, and therefore the Act of Parliament included both. But, having included both, I think it is impossible to say that we can take London as including Westminster, which we must take to include something lying beyond the precincts of London itself.

Now then comes the question whether that being so, and the cause having been heard within the province of Canterbury, the

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exigency of the statute is satisfied. I quite agree with the argument that the statute creates a new jurisdiction. The argument of Mr. Benjamin, founded upon the fact that the jurisdiction of the Dean of Arches existed long anterior to this Act, does not seem to me to touch this question. It is not as Dean of Arches that this jurisdiction is created in the judge. It is a mere accident that the judge appointed under this statute has become the Dean of Arches. The jurisdiction is the creation of the statute, and by the statute it was to be vested in a barrister of a certain standing with the proviso, which possibly may have been put in (I do not say it was) with a view of inducing Lord Penzance to accept an office which, after the judicial functions he had before discharged, might otherwise have appeared derogatory. "If you will undertake this office—to adjudicate upon these matters ecclesiastical,—as soon as the office of Dean of Arches and of the corresponding office in the province of York shall fall vacant, that office shall be vested in you." It is, therefore, to my mind an entirely new office, one with which the Dean of Arches under the former constitution of the Ecclesiastical Court had nothing to do. A new authority and jurisdiction is also vested in the Archbishop of Canterbury. Before the Act the duty of passing judgment upon a complaint of ecclesiastical misconduct belonged to the bishop. There is no doubt he would refer the matter eventually to the Dean of the Arches, but there was no intermediate jurisdiction in the Archbishop of Canterbury. A new jurisdiction is therefore created, although the complaint must in the first instance be to the bishop, and the bishop must notify it to the parties, and call upon them to say whether or not they will be bound by his decision; but if they will not agree to be bound by it without appeal, then the bishop refers the matter by the form given in the statute to the archbishop. But as far as the archbishop is concerned this is an entirely new authority, and an entirely new jurisdiction. This being so, in my opinion, the jurisdiction must be exercised in strict conformity to the statute which creates it. How is the archbishop to exercise his jurisdiction? By referring the matter to the judge, not generally leaving it to the discretion of the judge, where and when the cause shall be heard and adjudicated upon; but he is "to require the judge to

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hear the matter of the representation at any place within the diocese or province, or in London or Westminster." Mr. Benjamin made a faint attempt to say that all that was necessary was that the archbishop should require the judge to hear the matter of the representation, and that it was left entirely at the discretion of the judge to determine where he would hear the case, so long as he confined himself to the diocese or province, or to London or Westminster. I think that is a most erroneous reading of this statutory proviso. It is not that the archbishop shall require the judge to hear and leave it to the judge to determine in which of those districts he will hear it. It is the archbishop who is to require the judge to hear it in one of those places, as in the discretion of the archbishop he shall think it most convenient. Then is this requirement essential to the jurisdiction of the judge? I think it was intended by the legislature to be so. Therefore it is not competent to the judge, where the archbishop has fixed, in conformity with the statute, the place at which the hearing shall be held, to substitute for that place any other. It is part of the jurisdiction which the statute places in the power of the archbishop to create, and which it makes one of the conditions of the jurisdiction to be so created. Merely to appoint the judge to hear, without specifying the place at which the hearing is to be held, would be a vicious exercise of the archbishop's authority, and would confer no jurisdiction upon the judge. But Mr. Benjamin says further, "The omission in the form is an accident, a blunder of the clerk. The form which is drawn up and appended to the rules happens to have omitted the word 'province,' and the form used in the present action has followed the form appended to the rules. The word 'province,' it is true, is omitted, but it ought to be there, and therefore you may supply it, and the judge may be considered to have exercised his jurisdiction within a district prescribed by the archbishop." This argument is at once shattered when you look at the facts. The only jurisdiction which the judge can exercise is the jurisdiction given by the requisition of the archbishop, and when the archbishop omits the term "province," it is not for us to say that that omission is a mere accident, and was not in accordance with his intention. Suppose it had been the intention of the archbishop. Suppose the arch-

bishop had thought that to allow this matter to be heard within the large sphere of his province would be a hardship and injustice to the parties, and he had omitted the word "province" purposely, but had left to the judge the option of trying it in the diocese or in London or Westminster? The whole question is whether the provision is merely directory or a substantial part of the jurisdiction. In my opinion it is more than directory. I regret, as I have said before, for the reasons I have given, that we should be obliged to give effect to such an objection as this. I cannot, however, but think that it goes to the root and foundation of the jurisdiction.

MELLOR, J. I am entirely of the same opinion. I have already had the advantage of hearing this point discussed in the previous case of *Serjeant* v. *Dale* (1), and am able to come very conclusively to the same opinion as that expressed by my Lord. When we recollect how the Act came to be passed, the circumstances under which it went through parliament, the criticism which it underwent, and the protections which it was supposed were inserted in it, I cannot doubt that the origin of this provision was this. The then existing tribunal, that of the Dean of Arches, and the system of administering the law ecclesiastical were not sufficient to meet the exigencies of the case. Then what was done? The legislature did not improve or extend the jurisdiction of the Dean of Arches, but erected an entirely new tribunal, which had at that time no relation whatever to the jurisdiction exercised by the Dean of Arches. The enactment is only so far one of procedure that it regulates the practice of the new court, and prescribes the mode in which the jurisdiction is to be exercised. That it was the result of some jealousy on the part of the public is clear. It deprives the bishop of his former jurisdiction, and requires him to transmit the representation or complaint forthwith to the archbishop of the province, who is invested with authority to send it to the judge appointed under the Act. But he is to send it in a particular manner; by a request issued by himself in which he is to describe where the jurisdiction shall be exercised, and within what limits. I can well understand that

(1) 2 Q. B. D. 558.

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this provision proceeded from some jealousy on the part of the public. *Reg.* v. *Archbishop of Canterbury* (1), which was relied on by Mr. Benjamin, is to my mind a very strong authority against the defendants. It was there decided that the local limit of the jurisdiction, prescribed by 3 & 4 Vict. c. 86, could not by any means be extended. It was thought possible that there might be some inconvenience in that, and the present Act was passed; but then it is not left as a matter of discretion to any individual, except the archbishop, to determine within what place or what limits this jurisdiction shall be exercised. I cannot help thinking that the necessity of making this alteration, even by way of extension of the former limit, is a strong authority against Mr. Benjamin's contention.

The construction enlarging the definition "London" contended for by Dr. Stephens cannot be admitted. The construction of the provisions of a will proceeds upon very different principles indeed from that of a statute which defines and gives jurisdiction. The case which he cited affords no ground for holding that the word "London" in the Act has any larger meaning than the city of London, and that it is the London which is meant by people in the country when they speak of coming up to town, although probably they are coming up to Westminster and not to London. It is really like the statutes which give jurisdiction at Nisi Prius and other procedure Acts, in which London and Westminster are distinguished, the one from the other, and in which the jurisdiction prescribed to be exercised in the one cannot be exercised in the other. I agree entirely with my Lord that it is not a question of procedure but a question of jurisdiction, and I think it is a new jurisdiction; a new procedure adapted to the new jurisdiction, and the exposition of the authority of the archbishop which my Lord has given entirely satisfies my mind as to what is the real meaning of the section.

That being so, I am of opinion that the jurisdiction was not properly founded, and that the proceedings which took place in the absence of Mr. Tooth must be considered as void.

LUSH, J. I exceedingly regret the necessity under which I

(1) 6 E. & B. 546; 25 L. J. (Q.B.) 346.

feel of holding that this rule must be made absolute. The objection is one thoroughly of a technical nature, but as nothing has been brought before us to shew that the defendant has by anything he has done precluded himself from raising the objection, if it is a good one we are bound to give effect to it, though, I must say, considering the lapse of time that has occurred since the judgment was given, considering that the defendant has not thought fit to test the validity of that judgment by resorting to a court of appeal, the objection is one which comes with very bad grace from him. Nevertheless, if it is a good one, we are bound to give effect to it, and I am constrained to hold that it is a good one.

I cannot agree with Mr. Benjamin that the Act in question is one which merely alters and regulates the procedure before the Court of Arches. On the contrary, it gives new and summary proceedings against clergymen who are charged with the particular breaches of ecclesiastical law mentioned in the 8th section, and enlarges the authority of the new tribunal over them. And whereas before and at the time this Act passed no clergyman could be compelled to appear out of the diocese to answer any charge against him, this Act authorizes his being summoned to appear anywhere within the province, or in London or Westminster. With regard to the summons, I again differ from Mr. Benjamin. The authority is not given to the judge, but it is given to the archbishop. The words in the 9th section appear to me to afford no sound argument to the contrary. According to the terms of the Act, when the bishop remits the representation to the archbishop, "the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster." Then comes the following section, which says that the judge shall give notice to the parties of the time and place at which he shall proceed to hear the matter; so that the archbishop is to fix the limit within which the proceeding is to be heard, and having so done, the judge is to appoint the particular place within those limits at which he intends to sit. That, therefore, is a material extension of the powers over clergymen which existed at the time this Act passed. Unfortunately, the archbishop here adopted the form framed under

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the last section of this Act, and that form, I have no doubt for good reasons apparent to those who framed the form, omits the word "province," and does not authorize the clergyman to be summoned to any place out of the diocese. Now as the Act of Parliament does not give any express authority to frame forms, I do not think that form was binding upon the archbishop. The archbishop might, if he had chosen, have adopted the words of the Act, and have authorized the judge to summon him to appear anywhere within the province. But he has not done so. That being so, I think the archbishop has executed the authority which the Act gives him, and defined the limits within which the judge was to sit to hear the complaint.

Well, the judge sat neither in the diocese nor in London, according to the construction I put upon the word, nor in Westminster. He sat within the province, namely, at Lambeth; but then the authority given by the archbishop does not extend to summon the clergyman anywhere within the province, but only within the diocese, or within London or Westminster. The defendant did not appear, and if I am right in my construction of the word "London," he was not bound to appear. He was not bound to appear, before the Act passed, anywhere out of the diocese, and he now can only be bound to appear within those limits which the Act authorizes the archbishop to assign, and the archbishop has not assigned the province as one of them.

Another argument is that Lambeth is within London. That depends upon whether the word "London" here is to be taken to mean metropolitan London or municipal London. Metropolitan London embraces Westminster. Nobody, then, speaking of the metropolis at large, would think of mentioning Westminster, which is a part of it, as something distinct from London itself. Therefore I am constrained to hold that "London" here means London proper, otherwise there would be no necessity for naming the subordinate part, Westminster, which would be part of London. Therefore it must be taken to mean that the archbishop may require the judge to hear the matter at any place within the diocese, or within the city of London or Westminster. Unfortunately, the judge did not sit at either of those places. The defendant did not attend before him, and was not bound to attend.

I do not say what would have been the consequences if he had attended. I am far from saying that then the proceedings would not have been perfectly regular; but he did not attend, and the consequence was that the judge proceeded in his absence, and pronounced judgment against a person who did not appear and who was not bound to appear. It therefore seems to me impossible that the judgment can stand. As I said, nothing is brought before us to shew that the defendant has done anything whatever to preclude himself from taking the objection. The proceedings are not entirely at an end, and therefore we must assume that there is something upon which the prohibition can operate. Upon these grounds it is that I am bound, on the true construction of the Act of Parliament, to say that a prohibition must go.

This same point was before my Brother Mellor and myself in *Serjeant* v. *Dale* (1). But inasmuch as there was another objection there which itself was fatal to the proceedings, we did not trouble ourselves to come to a decision upon this point; we merely observed that it was one of a very serious nature. We have now had the benefit of a full argument, and have heard all that can be alleged on the other side, and I must confess that the view we then entertained has only been strengthened, and that I now decide, without any doubt, that the whole proceeding was coram non judice, on the ground that the learned judge sat where he was not authorized to sit by the requisition of the archbishop, and the defendant did not appear; so that there was no authority to proceed against him in his absence.

Rule absolute.

Solicitors for applicant: *Brooks, Jenkins, & Co.*

Solicitors for complainants in *Hudson v. Tooth* and for Lord Penzance: *Moore & Currey.*

(1) 2 Q. B. D. 558.

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Nov. 30.

THE QUEEN *v.* HOLBROOK AND OTHERS.

Libel—Criminal Information—Publication by Editor of Newspaper without Knowledge of Proprietors—Lord Campbell's Act (6 & 7 *Vict. c.* 96), *s.* 7.

11GBD45

At the trial of a criminal information against the defendants for a libel published in a newspaper of which they were proprietors, it appeared that each of them managed a different department of the newspaper, but that the duty of editing what was called the literary department was left by them entirely to an editor whom they had appointed named G. The libel in question was inserted in the paper by G. without the express authority, consent, or knowledge of the defendants. The judge having directed a verdict of guilty against the defendants:—

See 4 QBD 42. (1878)

Held, by Cockburn, C.J., and Lush, J., that there must be a new trial, for upon the true construction of 6 & 7 Vict. c. 96, s. 7, the libel was published without the defendants' authority, consent, or knowledge, and it was a question for the jury whether the publication arose from any want of due care and caution on their part.

By Mellor, J., dissenting, that the defendants, having for their own benefit employed an editor to manage a particular department of the newspaper, and given him full discretion as to the articles to be inserted in it, must be taken to have consented to the publication of the libel by him; that 6 & 7 Vict. c. 96, s. 7, had no application to the facts proved, and that the case was properly withdrawn from the jury.

In this case a criminal information had been obtained by J. Howard against the defendants, R., E. G., and A. R. Holbrook, the proprietors of the *Portsmouth Times and Naval Gazette*, for a libel published in that newspaper.

At the trial, before Lindley, J., at the Winchester Summer Assizes, 1877, it appeared that the newspaper was managed by the three defendants, who resided at Portsmouth (where the paper was published), one of them, A. Holbrook, taking the advertising department; another, R. Holbrook, a small share in the commercial part of the paper; and a third, E. G. Holbrook, superintended the financial and printing department. The alleged libel, which was in the form of a letter, was inserted by Green, the editor, without the knowledge of the defendants, one of whom was at the time absent from Portsmouth owing to the illness of a relation. Green was himself called for the defence, and stated that he was employed by the defendants to edit the literary department of the newspaper, and added, "they" (the defendants)

"leave everything to me." The jury, under the direction of the learned judge, found a verdict of guilty against the defendants.

A rule having been obtained calling on the prosecutor to shew cause why the verdict should not be set aside, or a new trial had, on the ground that the learned judge misdirected the jury in stating that the defendants were criminally responsible for the publication, although they had appointed a competent editor to conduct the newspaper, and on the ground that the publication was made without their actual authority, consent, or knowledge, and did not arise from want of due care or caution on their part,

A. Charles, Q.C., and *A. L. Smith*, shewed cause. The Act 6 & 7 Vict. c. 96 (1), has no application to the facts at the trial, which did not establish a presumptive case of publication, but shewed an actual publication of the newspaper by the authority of the defendants. If the defendants, who authorized another person to edit their newspaper and put in it what he pleased, are protected by the statute, the result will be that no criminal information can ever be filed against a newspaper proprietor. The Act was passed to remove the anomaly in the law of libel, by which proof of the proprietorship of a newspaper in which a libel was published was held to be conclusive proof of guilt. This is evident from the cases of *Rex* v. *Walter* (2); *Rex* v. *Gutch* (3); *Colburn* v. *Patmore* (4), which shew that the proprietor of a newspaper who took no part in the publication of a libel was held to be criminally responsible for it. This being the state of the law, the Act was passed with the intention of enabling the defendants to rebut the inference which would otherwise be drawn from the mere proof of proprietorship, by shewing that, although proprietors, they had no hand in the appointment of the editor or

(1) 6 & 7 Vict. c. 96, s. 7: "Whensoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part."

(2) 3 Esp. 21.

(3) Mood. & M. 433, at p. 437, per Lord Tenterden, C.J.

(4) 1 C. M. & R. 73, per Alderson, B., p. 76.

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person who inserted the libel, or that the libel was inserted by some stranger without their intervention. The Act was not intended to exonerate the active managers of newspapers, and to enable them to escape liability by committing one department of the paper of which they receive the profit, to an editor with full power to insert what he pleases.

[COCKBURN, C.J. Why should the Act give protection to a man who is presumed to be the publisher, and not extend it to one who is proved to be the actual publisher?

LUSH, J. You contend that the Act was passed, not to meet cases which had occurred, but to meet cases which had not occurred.]

No authority upon the precise question can be found; but in a civil action, *Barwick* v. *English Joint Stock Bank* (1), it was held that the bank were liable for the fraud of their manager, for they were liable for the conduct of their agent in doing the business in which they had placed him; and in *Reg.* v. *Stephens* (2) it was held that the owner of works, carried on for his profit by his agents, was liable to be indicted for a public nuisance, caused by the acts of his servants in carrying on the works.

H. T. Cole, Q.C., and *Folkard*, in support of the rule. It must be taken that the defendants did not authorize the publication of the libel. Neither could it be said that the publication was owing to any want of care on their part; but, at the least, this was a question which should have been left to the jury. The Report of the Commissioners, appointed by the House of Lords to inquire into the law of libel before the passing of 6 & 7 Vict. c. 96, shews that it was the intention of the legislature to protect the defendant where he is in a position to prove that the libel was published contrary to his instructions, and that he had not been acquainted with the contents of it.

COCKBURN, C.J. I am of opinion that this rule for a new trial should be made absolute. The facts, as I understand them, are as follows:—The defendants, three in number, are the proprietors of a newspaper in which this libellous article appeared. But it appears that at Portsmouth, the place where the newspaper is published,

(1) Law Rep. 2 Ex. 259. (2) Law Rep. 1 Q. B. 702.

the duties of managing the newspaper, or conducting the newspaper, are divided between four persons. There is an editor, who manages what has been called the literary department of the paper; one of the defendants takes the commercial part of the paper; another the advertising part of the paper; and the third the actual publication of the paper, the printing. At the time this article was inserted, one of the defendants had left and gone to a distant part of the country, and he, therefore, was certainly not cognisant of the fact of its publication. The others were present at the place of publication, and were engaged in discharging the duty which they had severally undertaken in the publication of this issue of the paper. But it was proved that in the part of the paper in which the libel appeared the duties had been left entirely to the editor—that neither of these defendants actually knew of the insertion of the letter in question. And now comes the question whether, although the editor, who was not proceeded against, might have been made responsible for the article which he himself inserted—whether the defendants, or any or either of them, are criminally responsible for the publication of this article. Now it is an undoubted principle of law in general that a man can only be made criminally responsible for an act which he has committed himself, or through the agency of another, either actually or constructively. And it is to be taken as a fact, as the case now stands, that the parties who were made the defendants in this criminal information were none of them actually cognisant of this publication; and it is not to be inferred, in my opinion, from the mere employment of an editor to conduct this part of the paper, however wide may be the discretion which they allowed to him in the conduct of it, that they gave him authority to do that which would be contrary to the criminal law of the land. You are at liberty to imply from the employment of an agent that whatever he does in the conduct of the business according to law has been sanctioned or authorized; but it is not, in my opinion, to be inferred that his employer has given him authority to commit crime, because he has employed him in the conduct of his business. But, at the same time, while that is the general proposition, there seems in practice to have been introduced an exception to the general rule in the particular case of

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libel, for whatever may formerly have been the view of the law, there can be no doubt Lord Kenyon, at Nisi Prius, and afterwards Lord Tenterden, also at Nisi Prius, held that where the fact of proprietorship was proved, and if the libel complained of was found in the publication conducted by the agents of the proprietor, the proprietor might be held criminally responsible. It is not at all necessary on the present occasion to say how far one assents to or dissents from that legal doctrine; it is enough to say that it was afterwards considered by some of the most enlightened thinkers of the day, lawyers and non-lawyers, that we had an anomaly in the law which violated the first principles of justice and ought to be got rid of. And I cannot doubt for a moment that it was with a view to correcting that anomaly that this 7th section, of what is popularly known by the name of Lord Campbell's Act, was passed. It was suggested, indeed, that it was to get rid of the difficulty in which a proprietor was placed by primâ facie proof of his proprietorship; from the presumption which arose from certain evidence which led fairly to the inference of proprietorship. It was also suggested that the section in question was passed with a view to enable a proprietor, where a libellous article had been inserted in a publication of which he was the proprietor by some one who might be thought to be his agent, but who, in point of fact, was not his agent, the agency having never been created, or having been put an end to, that it was passed to enable him to get rid of that assumption by adducing proof to rebut it. But the obvious answer to both these propositions is that as neither case arose as the law stood before, there was no necessity for such legislative assistance—the man who appeared to be proprietor primâ facie could not be prevented from disproving what primâ facie appeared, but did not in point of fact exist. I can only come to the conclusion that Lord Campbell's Act, in this 7th section, was intended to meet the anomaly to which I have just referred, viz., that of holding a man criminally responsible for something in which he had taken no part, and, in fact, of which he was not even cognisant. This being so, I ask myself whether this case is not within the protection of the 7th section, and, I think, in regard to one of the defendants, that it is clearly so. With regard to the others, it is more or less doubtful

what the fact might have been, but with regard to the man who had gone away and who was living in a distant part of the country at the time, who knew nothing of what was going on at the time this article is published, it seems to me that he is clearly within the protection of the 7th section, unless it can be shewn, which was not done in the present instance, that though absent, he gave actual authority to the editor to publish the libellous matter, or that he was, though at a distance, still taking his part in the conduct of the newspaper. But even in the last case it strikes me he could not be made responsible for that which he knew nothing of. With regard to the other defendants a different state of things presents itself. The statute excepts from the protection which it gives, the cases where authority has been given to publish libellous matter, where there has been consent to the publication either of the article in question or similar articles, where there has been knowledge of the act committed—that is, of the publication which is made the subject-matter of the offence—and where there has been, on the part of the proprietor whom it is sought to make responsible, any absence of due care and caution in the manner in which the newspaper is conducted, and as to the articles contained in it. Now, with regard to those defendants who were present and concerned in the immediate publication of that issue of the newspaper in which this article was inserted, it would be, in my opinion, a question for a jury whether or not, looking at their presence at the time of the publication, looking at the circumstances of their being there at the time when the publication was issued—they had any knowledge of what was done, and, having that knowledge, whether they must be taken to have consented to what was done, or, at all events, whether, by not looking to see what the paper contained before they suffered it to be issued, they were wanting in due care or caution. These are questions which, I think, might have been left to the jury. If the jury had found an absence of those things which are made the conditions of the statutory protection, then the 7th section would not apply to them; but if it turned out that according to the view of the jury there had neither been authority, nor consent, nor knowledge, nor any absence of due care or caution, then, in my opinion, the 7th section would have applied, and would have defeated a criminal prosecution. I

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say nothing of civil responsibility, as that stands upon a totally different footing. Then as to the cases cited, and the arguments used, with the view of shewing that such a proprietor is responsible civilly for the acts of his agent, I am not called upon to decide that point. We deal with penal responsibility, which stands upon a totally different footing, and is governed by a totally different principle. I can see no possible case to which the section applies if it is not to such a case as this. A party is sought to be made criminally responsible as a proprietor, but he is able to shew that although he was a proprietor of the newspaper, and although he employed an agent by whom the libellous article was inserted, still that he never gave him authority to publish libels and knew nothing whatever of what may have been inserted, and therefore gave no authority, nor ever consented to, nor even knew of, the article in question. And I find a section passed for the cure of what was deemed to be an anomaly in point of principle, and in the criminal law of the land. Whether it was wise to alter that law I do not stop to consider. I think, therefore, that this section was applicable, and that the learned judge was wrong in holding it inapplicable. Consequently, this case must go down for a new trial. When it has gone down for a new trial the jury will have to determine the issue of guilty or not guilty, with reference to the facts to which I have adverted, and possibly the case may come before us again, should it be necessary, in some more definite form, in which we should be able to deal with it.

MELLOR, J. I regret very much that I am unable to concur with the Lord Chief Justice in the view he takes of the case. I need hardly say, in differing from him—and I believe also from my Brother Lush—I have the greatest diffidence in saying that I think, under all the circumstances of the case, that the view taken by the learned judge at the trial, that the effect of the evidence was to take the defendants out of the protection of s. 7, was right. It is to be observed that, although I dare say the principal bearing of this section will be upon cases relating to newspapers, yet it is not confined to newspapers and booksellers, but applies generally. The case might be different if the defendants were living at a distance, or taking no part in the management of the paper

containing the libel; I cannot, however, but think that they must be held each of them, in one way or another, to take a share in the bringing out of the newspaper and in the actual publication of it. It is conducted for their profit; they receive all the benefit and the advantage which accrues to proprietors, as proprietors, of a paper—we assume it to be a profitable undertaking—conducted for their benefit. Now, in all cases of this description, nothing is more probable than that libels may be sent for publication, and may be published, without any knowledge of the person who actually sends them to the editor, or the manager. He may by inadvertence publish things which are libels, although not intending to do so. Well, this being the state of things, and the paper conducted for their benefit and their profit, I am bound to say myself that I cannot come to the conclusion to which my Lord seems to come with reference to the absent partner in this case. I think he is in the same condition as the other partners. It is true he was not actually on the spot at the time the particular paper was published. But he had duties with regard to the publication of the paper to perform, and if he did not perform them himself, some one else had to perform them for his benefit. In that state of things, without the aid of the statute, there would be no doubt whatever that upon the proof of publication at the offices of the partnership, it must have been held to be a libel for which the proprietor would be criminally responsible. I agree that the object of the statute was to interpose for the benefit of persons who might have been made liable without actual participation in the publication of the libel. Now, my Lord says, he knows of no case in which that clause can apply, if not in this case. With great submission to his judgment, I think it may. The discretion which is vested in the manager is a discretion vested in an individual man. He is selected as the editor of the newspaper, he is to be the alter ego with regard to the actual management of the paper of the defendants. I cannot help thinking that they, having done that, must be taken to authorize and to consent to the conduct of the paper as it is conducted, and that although they did not know of the actual libel itself, they knew generally what was the course of the management of the newspaper. And therefore I cannot bring myself to the

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conclusion that they do come within this exemption. The object of the statute was to give some relief, and if I mistake not, relief has been given. Now, I must take it upon the evidence that the defendants did not know of the actual publication of the article, but they had given, as it appears to me, an authority and consent as to the mode in which the paper should be conducted, and they were, therefore, responsible, as persons by whose authority and consent the libel has in fact been published. The prosecutor has only one matter to prove, but in order to bring themselves within the exemption the defendants have to prove two things. They have not only to prove that the publication was made without their authority, consent, or knowledge, but that the libel was not published from want of due care or caution on their part. Now, if the section had been divided, or there had been an alternative, I should have thought that my Brother Lindley ought to have submitted the matter to the jury. But if my Brother Lindley took the view that this case was not exempted by the section, because the article was inserted, according to his view, with the authority and consent of these defendants, then I think there was nothing for the jury, and that, therefore, he took the right course. There may possibly be an exemption in the case of persons who are mere proprietors of a newspaper, such as shareholders in the property, who take no part in the management of it themselves. Here I cannot help thinking that all the partners have committed themselves to the discretion of an individual. But suppose a case in which the editor—the person in whom they repose full confidence and allow this large discretion—supposing he were to die, or supposing he were to be discharged, and another editor was appointed without the consent and without the knowledge of the other proprietors, it may be then that the individual discretion which they had reposed in the individual editor was entirely gone, and that the new man could not be taken to be acting upon any authority or discretion vested in him by the defendants. Therefore I am of opinion, as at present advised—and I express great doubt, considering by what authority the other proposition has been sustained—that, upon the evidence that the editorship of the paper, was conducted by Mr. Green, who says, "They leave it entirely to me," that is, repose discretion in

me, and then goes on to describe the various parts which each of the defendants take in the conduct and management of the paper —that, under these circumstances, the judge was right in saying that the statute did not apply to the case. Upon the shewing of the defendants themselves, he was of opinion that the publication was with their authority or consent, although without their knowledge. Therefore it was unnecessary, under the circumstances, to submit the question to the jury, because for the prosecution it was sufficient to shew that it was done by the authority or consent of the defendants. For the defendants to obtain an acquittal under this section, they must have gone further, and not only shewn that it was without their authority or consent, but have shewn, in addition to that, that they had been guilty of no negligence or want of care or caution in the publication of the libel in question.

LUSH, J. There are two questions for our decision, and the first is this—what is the true construction of the 7th section of this Libel Act? The second is—whether there is not evidence which ought to have been left to the jury in support of the defendants' assertion that they brought themselves within that section. Upon the first question, I am constrained to differ from the view taken by my Brother Mellor, and also from that taken by my Brother Lindley, as I understand my Brother Mellor agrees with that taken by my Brother Lindley at the trial. There can be no doubt that it is a question of great importance. We must consider, in reading this section, what is the object and the purpose of the Act, and I own I prefer to gather that from the language of the Act itself, and what appears to have been the state of the law at the time it was passed. It is an Act professing to be, as it is, a remedial Act, to "Amend the Law of Libel," and it does amend the then existing law in several instances. We have to ascertain, in order to put a right interpretation on the words of this remedial Act, what was the mischief which it was designed to remedy. Now, one matter which was felt to be an anomaly and a grievance at the time the Act was passed was this: it had come to be accepted and received as settled law that the proprietor of a newspaper was criminally—not merely civilly, but criminally responsible for a libel inserted in his paper, and a

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bookseller or publisher was criminally responsible for a libel in any book which was sold or published by the persons acting under his authority, even though he himself did not know or authorize the insertion of any libel, and did not even know of its existence. It had been for many years received as the settled law, and, as I say, it was acknowledged on all hands to be an anomaly and felt to be a grievance. It was an anomaly because it differed from every other case. The case cited of the nuisance stood upon entirely different grounds, in that the owner of a business was held to be criminally responsible, because his servant, in the course of managing his business, had been guilty of a public wrong—a public nuisance. But a libel is a private injury. It is only treated by the law as a public one, because of its supposed consequences. It is really a private injury, for the party libelled has his remedy, either by action or indictment. That being the state of the law, we are to read the Act with reference to this, and now I find in the 7th section words which exactly fit that state of things. I, therefore, do not feel at liberty to adopt the very narrow construction suggested by Mr. Charles, which would make it applicable only to a hypothetical state of things, which, as far as we know, had never existed, at least, as a subject of judicial decision, and not to apply it to a state of things which was always recognised as an anomaly, and always felt to be a grievance. I cannot read a remedial Act in that sense. The words appear to be exactly fitted to my interpretation—that a newspaper proprietor cannot be criminally responsible for a libel of which he had no knowledge at all, nor a bookseller criminally responsible for a book sold from his counter containing a libel of which he knew nothing. What is the fair meaning of these words as applied to that state of things? "Whensoever, upon trial of any indictment or information for the publication of a libel, under a plea of not guilty evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due caution on his part." They exactly fit this case. The editor had inserted a libel acting under his authority.

They exactly apply to the bookseller whose servant has sold over his counter a book containing a libel, the bookseller having given no authority for the issue of the libel. The defendants are there carrying on the business, and this section cannot be taken to mean, in my view, that the paper itself must be published without consent, authority, or knowledge, or that the particular book must be sold without their consent, authority, or knowledge. What it must mean is that the libel—speaking of the publication of the libel—that the libel was there "without his authority, consent, or knowledge, and the publication did not arise from want of due care or caution on the part of the defendant." That is precisely the remedy one would expect to be applied by the legislature to the existing anomaly. And why should we confine it to anything short of that which was known to be a matter denounced by the public and by those who had to suffer the penalties of this very severe and stringent law? I cannot doubt for a moment that that is the fair meaning of this clause. It means that the proprietor of a newspaper, or the proprietor of a bookseller's business, whose authorized agent inserts in the paper, or sells over the counter in a book, some libellous matter without his knowledge, shall not be made criminally responsible if he is able to shew that the libellous matter was published "without his authority, consent, or knowledge," and that it "did not arise from want of due care or caution on his part." These words appear to me to afford ample protection to the public, without inflicting any exceptional and severe injury upon the proprietor himself. Then comes the question—Was there evidence here which the learned judge should have left to the jury, tending to shew that this was inserted without the authority, consent, or knowledge of the proprietors, and without any want of due care and caution on their part? Now I cannot read the evidence of the editor without coming to the conviction that there was abundant evidence which might, and ought to have been left to the jury. His evidence is that the defendants had nothing to do with the editorship of the paper. What is the editor's evidence? "They leave it entirely to me. Richard Holbrook takes but a small share in the management of the commercial part of the paper. E. G. Holbrook has the management of the financial and printing departments.

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Arthur Holbrook has the management of the advertisement department." There is no evidence that any single paper was sold or issued by them after the complaint was made to them, or after they knew of the libel being there. Therefore it appears to me that there was abundant evidence, which should have been left to the jury, that would justify them in finding that this libel was inserted without their "authority, consent, or knowledge, and that the said publication did not arise from any want of due care or caution on their part." It is quite competent to the prosecutor upon the second trial to prove, if he can, that the defendants sold papers after they knew of the libel. That would make publication on their part, and is quite a different matter. There is no such evidence here. Now, the learned judge held that there was no evidence whatever to bring them within the protection of that 7th section; and in that respect I cannot help thinking—I do so with great diffidence, as my Brother Mellor disagrees with me—that he was wrong, and that this evidence, which should have been left to the jury, and which would have justified them in finding the defendants not criminally responsible, entitles them to the protection which this clause, in my view, was intended to give.

Rule absolute.

Solicitors for prosecution: *Gregory, Rowcliffe, Rowcliffe, & Rawle.*

Solicitors for defendants: *Ford & Ford, for Feltham, Portsea.*

THE COMPANY OF THE PROPRIETORS OF THE REGENT'S CANAL, APPELLANTS; THE ASSESSMENT COMMITTEE OF ST. PANCRAS, RESPONDENTS. 1877 *Dec.* 19.

Poor Rate—Canal—"Lands of a like quality"—Mode of Assessment.

By a canal company's special Act, it was provided that the lands of the company, whether covered with water or not, and also all dwelling-houses, wharves, warehouses, lockhouses, and other houses of the company, should be rateable; the lands according to their quantity and quality, and the dwelling-houses, &c., according to the nature and respective uses, dimensions, and descriptions thereof; and should be charged and assessed in like manner as lands of a like quality and dwelling-houses, &c., of a like and similar size, nature, dimension, or description in the respective parishes where the same should be situate, were, or should be assessed or charged. The lands adjoining the canal were all built upon, and the assessment committee sought to assess the canal and towing-path on the following principle. They assumed the area occupied thereby to be covered by buildings similar in rateable value to the buildings adjoining the canal, allowing for necessary roads, access, &c., and then took a proportionate part of such rateable value as representing the rateable value of the lands so covered as distinguished from the buildings:—

Held, that, the canal ought to be rated in like manner as land of the like quality in the parish uncovered with buildings, the value of which might be increased from time to time by circumstances, and that the mode of assessment proposed by the assessment committee was therefore incorrect.

SPECIAL CASE, stated under the provisions of "The Valuation (Metropolis) Act, 1869," sect. 40, notice of appeal to the Assessment Sessions having been previously given by the appellants, as provided by the said Act.

1. The Regent's Canal Company was incorporated by an Act of Parliament, 52 Geo. 3, c. 195, local and personal, for the purpose of "making and maintaining a navigable canal from the Grand Junction Canal in the parish of Paddington to the river Thames, in the parish of Limehouse, with a collateral cut in the parish of St. Leonard, Shoreditch, in the county of Middlesex."

2. The canal was made in pursuance of the said Act, and part of the said canal passes through the parish of St. Pancras, in which parish there are four double locks. The property of the said company in the said parish in the occupation of the company, consists as described in the valuation list hereinafter mentioned, of

No. 6590..Canal, towing-paths, sloping banks, and locks.

No. 6591..Dwelling-house, office, and stable.

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No. 6591a..Cottages, near locks;

and the extent of the property above-mentioned, numbered 6590, is about 21½ acres, and the length of the canal 2 miles 3 furlongs and 196 yards, of width varying from 31 ft. to 129 ft.

3. By 52 Geo. 3, c. 195, s. 101, it is enacted as follows: "And be it further enacted that the lands, whether covered with water or not, and all dwelling-houses, wharves, warehouses, lockhouses, and other houses of and belonging to the said company shall be rateable and chargeable to the maintenance of the poor, and to all other parochial rates and taxes in the several parishes and places where they are respectively situated; the lands according to their quantity and quality, and the dwelling-houses, wharves, warehouses, lockhouses, and other houses according to the nature and respective uses, dimensions, and descriptions thereof; and shall be charged and assessed in like manner as lands of a like quality, and dwelling-houses, wharves, warehouses, lockhouses, and other houses of a like and similar size, nature, dimension, or description, in the respective parishes where the same shall be situate, are, or shall be assessed or charged, and that the rates, duties, and other personal property of the said company liable to be rated to the poor or other parochial taxes in any such parishes or places shall be rated and assessed in like manner and in the same proportion as other personal property rateable in the said parishes and places respectively shall be rated and assessed, and according to the length of the line of the said navigation in such respective parishes and places, and not otherwise, or in any other manner: provided that, before such personal property shall be rated, fourteen days' notice shall be given in writing to, or left at the dwelling-house or usual place of abode of the treasurer or clerk, or any other officer of the said company residing in the parish or place where such rate shall be intended to be made by the respective overseers of the poor of the intention so to do."

4. At the date of the passing of this Act (1812), the lands through which it was proposed that the canal should pass, and through which it afterwards was made, were to a considerable extent lands agricultural and pasture, and some of the said lands were used as yards or gardens, and some were covered with houses, &c. At the present time within the parish the lands adjoining the canal have been built upon, with the exception of that part passing

through Regent's Park, and these buildings are assessed to the poor rate. If the area now occupied by the canal and towing-path were assumed to be covered by buildings, similar in rateable value to the buildings adjoining the canal, allowing for necessary roads, access, &c., and a proportionate part of such rateable value were taken as representing the rateable value of the lands so covered, as distinguished from the buildings standing upon them, then such proportionate part would be the sum of 1134*l.* gross, and 915*l.* net rateable value.

5. The area of uncovered land in the parish in 1873 amounted to about one-fourth of the total area of the parish. If the canal were assessed in the ordinary way in which canals—the Acts of Parliament relating to which do not contain any special provision as to rating—are now assessed, namely, by deducting from the gross receipts in the parish the expenses and outgoings in the parish, and allowances for tenant's and trade profits, risks, maintenance, &c., then the sum at which the property of the company is now assessed exceeds the sum at which the appellants claim to be rated.

6. In June, 1875, the overseers of the parish of St. Pancras made, under the provisions of the Valuation (Metropolis) Act, 1869, a valuation list of the property in the said parish, and in the said list the "gross value" of the property belonging to the Regent's Canal Company, therein numbered 6590, was increased from 500*l.* to 2268*l.*, and the "rateable value" from 418*l.* to 1418*l.*, the sums of 500*l.* and 418*l.* respectively, being the amount of the "gross" and "rateable" values at which the same property had been assessed in the assessment of 1870.

7. The company duly objected, before the assessment committee of the said parish of St. Pancras, to the valuation list with respect to the property therein numbered 6590, on the ground that the "gross" and "rateable" values of the said property were not made in accordance with the requirements of the Company's Act of Parliament, 52 Geo. 3, c. 195, s. 101, but the company failed to obtain such relief as they deemed just. In their notice of objection they stated, as the correction which they desired to make, that the "gross value" should be reduced to 107*l.* 10*s.*, and the "rateable value" to 86*l.*

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8. Notice of appeal was duly served, upon which it was agreed to state this case.

9. If the said canal and towing-path were assessed (as the appellants contend they ought to be assessed) as uncovered land of similar quantity and quality, applicable to any purpose except building purposes, on a building agreement, the "gross" and "rateable" values would not exceed the values which the appellants desired to have inserted in the valuation list in lieu of those inserted by the parish officers; or if the canal and towing-path were rated and assessed as, in the alternative, the appellants contend that they ought to be assessed, according to their quantity and quality as uncovered land, in like manner as lands of the like quantity and quality are, in point of fact, assessed in the parish of St. Pancras, the appellants' valuation would be correct.

10. The respondents contend that the section set out in paragraph 3 was not inserted by the legislature for the purpose of limiting, directly or indirectly, the assessable value of the appellants' property, but only to remove a difficulty that then existed from the view of the law then laid down by the courts, namely, that canal rates or dues, &c., were assessable, per se, and only in the parish in which they were considered to be earned, namely, where the voyages respectively terminated; that this view of the law was altered shortly after this Act, and the canal rates, &c., have been since considered as an element of the occupation, in other words as of the quality of the land, and therefore the property should be rated on the principle laid down in paragraph 5, or, in the alternative, on the annual value of the adjoining lands as in paragraph 4.

The question for the opinion of the Court is, upon what principle the canal and towing-path are to be valued and assessed?

If the Court should be of opinion that either of the two contentions of the appellants is right, then the gross and rateable values are to be reduced to 215*l.* gross and 204*l.* rateable.

If the principle stated in paragraph 4 be correct, then the gross value is to be reduced to 1134*l.*, and the rateable value to 915*l.*

If the principle stated in paragraph 5 be correct, then it is agreed that the amount of the gross and rateable values respectively shall be determined by an arbitrator.

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F. M. White, Q.C., for the appellants. It will not be seriously contended that the canal is to be rated in the manner suggested in the 5th paragraph of the case. The only other manner suggested by the respondents is that suggested in the 4th paragraph, but on that point the case is governed by the decision in *Grand Junction Canal Co.* v. *Hemel Hempstead* (1). There was in that case a section containing special provisions as to the rating of a canal very similar to the present, inasmuch as a distinction was drawn in the section between lands and buildings, which is the case here. The Court on that ground distinguished the case from *Reg.* v. *Glamorganshire Canal Co.* (2), where it was held that in estimating the value of the canal the value of adjoining lands, as enhanced by being built upon, might be considered. The true mode of assessment applicable to this case, according to the decision in *Grand Junction Canal Co.* v. *Hemel Hempstead* (1), is to take into consideration the value of other land in the parish, as it may exist from time to time, for any purposes to which the land may be most profitably applied except building purposes. It is admitted that the amount suggested by the appellants gives the full value as estimated by the actual existing value of adjacent land for any purposes except building purposes.

[LUSH, J. Why should you exclude building purposes?]

Because a tenant from year to year will not give the value of the land for such purposes. That value is not in the land until it is let for a term of years on a building agreement.

[He also cited *Reg.* v. *Grand Junction Canal Co.* (3)]

Poland (*Castle*, with him), for the respondents. The respondents contend that the true principle of rating applicable to this case is that suggested in the 4th paragraph of the special case. The words of the section in this case are different from those of the section in *Grand Junction Canal Co.* v. *Hemel Hempstead.* (1) The words here are "and shall be charged and assessed in like manner as lands of a like quality." It is clear that the word "quality" does not mean producing quality for agricultural purposes. It means to include the value as it might exist from

(1) Law Rep. 6 Q. B. 173. (2) 3 E. & E. 186; 29 L. J. (M.C.) 238.
(3) 7 W. R. 597.

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time to time for any purpose. If so, why are building purposes to be excluded? The intention of the legislature is obvious: though, on the one hand, the canal is not to be rated as a railway is, with reference to its profits, on the other it is to be rated as if the land had remained in the hands of individuals, and so been applicable to the same purposes as other land in the parish. The rest of the land in the parish is building land.

[LUSH, J. The section distinguishes between land and buildings, clearly shewing that the land is not to be treated as if covered with buildings.]

It is not suggested that it should be so treated, for the respondents propose to deduct the value of the buildings.

[LUSH, J. Has such a mode of valuation as that you propose been heard of before in the history of rating? How is the value of the land to be separated from that of the building upon it?]

That is a mere question of valuation. It might be difficult to apportion the whole value, but it is submitted that it would not be impossible for persons experienced in valuation to arrive at a fair and reasonable estimate of what was attributable to the land and what to the building upon it. With regard to the objection that you must take the value to let from year to year, it has often been held that where there is no actual lease, still the reasonable expectation that the tenancy will continue may be considered. So here, though there is no actual building lease in fact, why should not the yearly value be estimated on the footing that the tenancy will continue for a reasonable time?

MELLOR, J. I am of opinion that the mode in which the assessable value of the lands is estimated by the appellants is the most correct. There is considerable difficulty in any aspect of the case. I cannot think, however, that the principle for which Mr. Poland contended can really be what the Act of Parliament intended by the use of the word "land" taken in connection with the residue of the section. A marked distinction is made between lands and buildings. It is admitted that this land could never be covered with buildings, but it is right that it should pay a rate according to the varying circumstances which may cause the value of land in the neighbourhood to alter. The intention of

the section seems to me in accordance with that view. The respondents contend, on the other hand, that the land is to be treated as built upon; and then, in some way or other, the value of the building is to be separated from that of the land, so that the simple value of the land may be so arrived at. It seems to me that the land must be dealt with, in estimating its value, as subject to the limitations imposed by the statute; and I do not think the statute sanctions the introduction of any such principle of rating as that contended for by the respondents. Such a mode of rating would be an entire novelty, and would, in my opinion, give rise to great difficulties and complications.

LUSH, J. I am of the same opinion. The view that underlies the contention of the respondents is, it seems to me, that the soil of the canal ought to be treated as if covered by buildings, which it no doubt would have been but for the canal. They are not, however, bold enough to go that length; but they propose, first, to suppose the land covered with buildings, and then to deduct the value of the buildings, thus by some means severing the value of the building from that of the land on which it is built. How that is to be done I am unable to gather from the argument. I suppose those who devised this ingenious theory of rating have some idea how it is to be carried out, but I confess it seems to me a complete novelty, and I have not been able to understand how in practice it would be worked. The Act, it must be observed, draws a clear distinction between houses and lands. The land is to be rated as land of the same quantity and quality, &c.; that means land not used for building purposes. The word "quality" cannot mean producing quality, but the obvious intention is that the value shall be estimated with reference to that of land of a similar description not built upon, though it may be enhanced in value by the proximity of buildings. For these reasons our judgment must be for the appellants.

Judgment for the appellants.

Solicitors for appellants: *Ellis & Ellis.*
Solicitors for respondents: *Cunliffe, Beaumont, & Davenport.*

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WELPLY *v.* BUHL.

Practice—Remitting Case to County Court—30 & 31 Vict. c. 142, s. 10—Security for Costs, Extension of Time for giving.

An order was made under 30 & 31 Vict. c. 142, s. 10, remitting an action to the county court unless security was given for costs within a week. The plaintiff did not give security within the time limited, but after that time applied for and obtained an order extending the time for giving security:—

Held, that until the plaintiff had lodged the writ and order remitting the action with the registrar of the county court in accordance with the 10th section of 30 & 31 Vict. c. 142, s. 10, the action remained in the superior Court, and consequently there was jurisdiction to make the order extending the time for giving security.

Affirmed Post 253 C A

APPEAL against an order of Fry, J., at chambers.

In this case the master had, on the 7th of December, made an order that, unless the plaintiff should, within a week, give full security for the defendant's costs to the satisfaction of one of the masters of the court, the cause should be remitted for trial to the Westminster county court, under 30 & 31 Vict. c. 142, s. 10. On the 11th of December the matter came before the master to fix the nature of the security, and he ordered that the plaintiff should either give security by payment of 75*l.* into court, or by a bond as specified in his order.

The plaintiff did not give security within the week as required, and did not lodge the writ and order remitting the action with the registrar of the county court as provided by the 30 & 31 Vict. c. 142, s. 10; but on the 20th of December he applied to a master at chambers for further time, and the master made an order that the plaintiff should be at liberty to give full security within three days, notwithstanding the time limited by the first order had expired, or to pay money into court instead of giving security, and that on such security being given or money paid into court, the proceedings should be continued in the Queen's Bench Division, as if security had been given or money paid into court in accordance with the former order.

On the 21st of December the plaintiff paid the required amount into court. The defendant applied to Fry, J., by way of appeal

against the master's order extending the time, and Fry, J., rescinded the order.

C. Russell, Q.C., and *Tapping*, moved by way of appeal against the order of Fry, J. They contended that until the plaintiff had lodged the writ and order remitting the action with the registrar of the county court, as required by the 10th section of 30 & 31 Vict. c. 142, the action remained in the superior Court, and the master had jurisdiction to vary the order.

Anderson shewed cause. He contended that the effect of the order was to remit the action to the county court upon the expiration of the time limited for giving security for costs, and that consequently there was no jurisdiction to make the order extending the time: *Scutt* v. *Freeman*. (1)

COCKBURN, C.J. I think the order of Fry, J., must be set aside. This is a case in which the court, or a judge, or a master exercising the judge's authority has jurisdiction under 30 & 31 Vict. c. 142, s. 10, to make one of two orders—viz., to order that, if security be not given or money paid into court to secure the defendant's costs, the action shall be stayed; or, in the alternative, to order that it shall be remitted to the county court. The master made an order that the cause should be remitted unless security was given or money paid into court within a certain time, and it appears that neither of those things was done within the time limited. Therefore, as things stood, the plaintiff could not have gone on in the superior Court, but, if he wished to proceed, must have done so in the county court.

Then, how does the case get to the county court? Not by virtue of the order, for the Act provides that the plaintiff shall himself take it there by lodging the writ and the order remitting the action with the registrar. Unless and until he does so the county court has no jurisdiction, for it can only acquire the jurisdiction by the mode of procedure prescribed by the Act. In the meantime it appears to me that the cause remains in the superior Court. I feel the force of the argument that the plaintiff cannot be allowed to keep up that state of things indefinitely; but it

(1) 2 Q. B. D. 177.

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seems to me that the remedy, if the defendant wishes to force the plaintiff either to abandon the action or to take it to the county court, is by applying for a further order to compel him to adopt one of these two courses. If the master had adopted the other alternative pointed out by the section, and had merely stayed the proceedings, instead of remitting the action to the county court, there would have been no doubt that the action would still have been in the superior Court. I think that there is no real difference between the effects of these two forms of order, until the action has been taken to the county court by the plaintiff. Until that is done it remains in the superior Court, and may be dealt with accordingly. And so, as it seems to me, a judge or master has still jurisdiction to vary the order. For these reasons, I think that the order of Fry, J., was wrong and must be set aside.

MANISTY, J. I am of the same opinion. The statute has prescribed a mode by which an action in the superior Court may be removed to the county court; but until it has been so removed the proceedings, though they may have been stayed, remain in the superior Court. The county court does not, as it seems to me, acquire jurisdiction until the writ and order are lodged with the registrar. If the plaintiff does not take this step, I think an order may, in some form or other, be procured to compel him to do so, or to abandon the action, for the Act renders it obligatory upon him to lodge the writ and order.

Rule absolute.

Solicitor for plaintiff: *J. E. S. King.*
Solicitors for defendant: *Alsop & Co.*

WHISTLER *v.* HANCOCK. 1878 Jan. 11.

Practice—Dismissal of Action for want of prosecution—Order XXIX., Rule 1 Extension of Time for delivery of Statement of Claim.

An order was made under Order XXIX., Rule 1, dismissing an action for want of prosecution, unless a statement of claim should be delivered within a week. The week having expired, and no statement of claim having been delivered:—

Held, that the action was at an end, and there was no jurisdiction to make an order subsequently extending the time for delivery of the statement of claim.

4 QBD 402
4 CPD 126
228-9, 231
6 QBD 117
118, 120

APPEAL against an order of Fry, J., at chambers.

This was an action upon a dishonoured cheque under the Bills of Exchange Act. The defendant obtained leave to appear and defend. On the 15th of December, a master made an order under Order XXIX., Rule 1, dismissing the action for want of prosecution, unless the statement of claim were delivered within a week.

On the 22nd of December the plaintiff took out a summons to set aside the appearance, and this on the 27th of December was dismissed by the master. The plaintiff gave notice of appeal against the decision of the master. On the 29th of December the plaintiff delivered a notice in lieu of statement of claim under Order XXI., Rule 4. On the 31st of December the plaintiff took out a summons for further time for delivering statement of claim, and on the 1st of January the master made an order giving the plaintiff a week's time. This order was set aside on appeal, by Fry, J., on the ground that the master had no jurisdiction to make the order.

Jelf, for the plaintiff, moved to rescind the order of Fry, J. He contended that the master had jurisdiction under Order LVII., Rule 6.

Lyon, for the defendant, shewed cause.

COCKBURN, C.J. This is a very plain case. The defendant obtained an order that unless the statement of claim were delivered within a week the action should be at an end. The plaintiff took out a summons to set aside the appearance, and if he could have obtained an order to that effect before the week was out, he would have been the victor; but before his summons could be heard he

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fell under the operation of the order dismissing the action, and the action was at an end. It cannot be contended that the taking out of a summons to set aside the appearance in the meantime could keep the action alive after the period when by the operation of the master's order it was defunct. For these reasons, I think the master had no jurisdiction, and the order of Fry, J., was right.

MANISTY, J. I am of the same opinion. The mistake on the part of the plaintiff was in not applying within the week to set aside or vary the order of the 15th of December.

Rule refused. (1)

Solicitors for plaintiff: *Richard Jones & Co.*
Solicitor for defendant: *H. R. Jones.*

4 C.P.D. 126
22 S.J. 231
6 Q.B.D. 117
48 L.J.Q.B. 126

(1) This decision was followed in the Exchequer Division in *Wallis* v. *Hepburn* where the same question arose. An order was made at chambers on the 8th of November, 1877, to dismiss the action unless a statement of claim were delivered within ten days. The time having expired, on the 20th of November a master's order was made extending the time for delivering the statement of claim. This order having been affirmed at chambers by Pollock, B., the defendant appealed.

Jan. 12. *Jelf*, for the defendant, cited *Whistler* v. *Handcock*.

Pitt-Lewis, for the plaintiff.

Jan. 14. THE COURT (Cleasby, B. and Hawkins, J.), after consulting the judges of the Queen's Bench Division, held that there was no jurisdiction to make the order of the 20th of November, the action being then dead, and that the order must be set aside.

Appeal allowed.

Solicitor for plaintiff: *J. Haynes.*
Solicitors for defendant: *Peacock & Goddard.*

ANGUS & Co. *v.* DALTON AND THE COMMISSIONERS OF HER MAJESTY'S WORKS AND PUBLIC BUILDINGS.

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April 26; *Dec.* 11.

Easement—Lateral Support of House by adjoining Soil—Twenty Years' uninterrupted Enjoyment—Presumption, how far affected by inability to prevent Enjoyment—Conversion of Dwelling-house into Factory—2 & 3 Wm. 4, c. 71, s. 2.

In an action by the owners of a factory against the defendants for excavating the soil of an adjoining house in such a manner as to leave the foundation of part of the factory without sufficient lateral support, and thereby causing it to fall, it appeared that the two buildings had apparently been erected at the same time, and were estimated to be upwards of 100 years old. Both had been occupied as dwelling-houses until about twenty-seven years before the accident, but the plaintiffs' predecessor had then converted his house into a coach factory, removing the internal walls, and erecting a stack of brickwork which both served as a chimney stack, and supported the girders which had to be put up to sustain the floors. The defendants, in taking down the adjoining house and in digging cellars which had not previously existed, left a support for the chimney stack which proved insufficient, and it fell, drawing after it the entire factory:—

Held, by the majority of the Court (Cockburn, C.J, and Mellor, J.), that the defendants were entitled to judgment, for first, no grant of a right of lateral support for the factory by the adjacent land could be presumed from the enjoyment of such support by the plaintiff for twenty years, inasmuch as the owners of this land never had any power to oppose the conversion of the dwelling-house into a factory, and had no reasonable means of resisting or preventing the enjoyment by such factory of lateral support from the adjoining soil, and for the same reason such support was not an easement which had been enjoyed for twenty years within the Prescription Act (2 & 3 Wm. 4, c. 71, s. 2), as it could not be said to have been enjoyed by a person claiming right thereto and without interruption.

By Lush, J., dissenting, that, after twenty years' enjoyment without physical obstruction of such support for the land with the factory upon it, it must be presumed that it had been enjoyed by virtue of some grant or agreement; that the mere absence of assent on the part of the adjoining owner was immaterial, and that the plaintiff was entitled to judgment.

CLAIM, stating that plaintiffs were coachbuilders, and possessed of the land, buildings, manufactory, and premises in Westgate Road, Newcastle-upon-Tyne, known as "Angus' Coach Manufactory and Show Rooms," where they carried on the business of coachbuilders; that they were entitled to have the land and buildings supported by the land adjacent thereto, and by the land and minerals under the same, and were entitled to support for their buildings from the walls of a building adjoining thereto; that the defendants wrongfully removed the land and minerals under and

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adjacent to the buildings of the plaintiffs, and wrongfully and carelessly removed the walls of the adjacent building, and made excavations in land adjacent to the land and premises of the plaintiffs in a negligent and careless manner, and without taking reasonable and proper precautions to support and secure the buildings of the plaintiffs. That by reason of the premises the buildings of the plaintiffs were deprived of the support to which they were entitled, and a large part of them fell.

Defence, 1, by the defendant Dalton, denying the right to support, the trespasses, &c., in the statement of claim, and alleging that the trespasses, &c., were done (if at all) by contractors employed by him who were not under his management or direction, and over whom he had no control. 2. By the Commissioners of Works and Buildings, denying the right to support, the trespasses, &c., and alleging that the commissioners had contracted with the defendant Dalton for the execution of building works on premises adjacent to the plaintiffs' premises, by which contract it was provided that Dalton should complete the work conformably to the specification and conditions. That by the specification it was provided that he should shore up the adjoining buildings and make good all damage that might be caused thereto during the erection of the building; that if any trespass, damage, or injury was done by Dalton in the execution of the works it was caused by his neglect, and was not a necessary and probable consequence of the works ordered by the other defendants.

Reply: joining issue upon the defences, and demurring to so much of them as disclaimed liability for the acts of Dalton and the contractors respectively.

At the trial, before Lush, J., at the Newcastle Summer Assizes, 1876, the learned judge directed a verdict for the plaintiffs for the amount claimed, subject to a reference to ascertain the damages, and extended the time to enable the plaintiffs to move for judgment.

1877. April 26. The plaintiffs moved accordingly.

Littler, Q.C., G. Bruce, and *Ridley*, for the plaintiff.

Sir J. Fitzjames Stephen, Q.C., and *Shield*, for the Commissioners of Works and Buildings.

Herschell, Q.C., and *Wheeler*, for the defendant Dalton.

The facts of the case, the arguments, and cases cited will be found in the following judgments.

Cur. adv. vult.

Dec. 11. The following judgments were delivered:—

LUSH, J. The plaintiffs are owners in fee of a coach factory at Newcastle-upon-Tyne. The defendant Dalton is a builder, who had been employed by the Commissioners of Works and Buildings, under a contract to take down a house adjoining to the plaintiffs' factory, and to erect in its stead, a building to be used as a Probate office.

The action is brought for excavating the soil of the adjoining property, on which the Probate office was to be built, to such a depth, as left the foundation of that part of the coach factory without sufficient lateral support, and thereby causing the factory to fall.

The two houses were apparently built at the same time, and were estimated to be upwards of a hundred years old. They were divided by a wall which belonged to the house pulled down, and which wall had been taken down by the defendants without injury to the factory.

Up to the year 1849, being about twenty-seven years before the accident, both houses had been occupied as dwelling-houses; but in that year the plaintiffs' predecessor converted his house into a coach factory, and to adapt it to this purpose he removed the internal walls, and erected on his own soil close to and in contact with so much of the dividing wall, a large stack of brickwork serving the twofold purpose of a chimney stack, and also of a support to the main girders which had to be put in to sustain the floors. These girders were inserted into the stack on the one side, and into the plaintiffs' wall on the opposite side, and were strongly secured with braces and struts, and they thus formed the main support of the upper stories of the factory. When the defendants removed the dividing wall they left this stack untouched, and erected on the site of the dividing wall, a temporary wooden gable so as to protect the factory while the new building was in progress. There had been no cellarage in the adjoining house, and it was

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not disputed that if none had been made, the stack and the factory would not have been affected by the alterations.

The defendants, however, having removed the dividing wall and erected the temporary gable, proceeded to dig to the depth of several feet below the level of the foundation of the plaintiffs' stack, leaving a thick pillar of the original clay around the stack for the purpose of supporting it during the erection of the new dividing wall. This pillar, however, large as it was, proved to be insufficient. After exposure to the air, and before the foundations of the new wall had been completed, it gave way, and the stack sunk and fell, drawing after it the entire factory.

Under these circumstances, it was contended, on behalf of the defendants, first, that the plaintiffs' factory was not entitled to the support of the adjacent soil; and, secondly, that at all events the Commissioners of Works and Buildings were not responsible for the negligence of the contractor, in not leaving sufficient support or not properly shoring up the chimney stack.

These points were reserved at the trial, which took place before me at Newcastle at the summer assizes, 1876, and a verdict was entered for the plaintiffs, subject to the questions of law and to a reference to an arbitrator to assess the damages, in case the verdict should stand against both or either of the defendants.

We expressed our opinion during the argument that upon the subordinate question of the liability of the commissioners for the acts of the contractor, we were bound by the case of *Bower* v. *Peate* (1), but we took time to consider our judgment upon the main question, namely, whether the plaintiffs had acquired a right to the support of the adjacent soil for their building, especially having regard to the fact that it had been altered from a dwelling-house to a factory, and that the adjacent soil had thereby, and by the use made of the altered fabric, been burdened with considerable additional weight beyond what it had to bear when the house was originally built.

It was not suggested, nor was there any ground for the supposition, that up to the moment of the fall, the factory was not a perfectly sound and stable building, nor that any alteration had been made in it since its conversion from a dwelling-house in the

(1) 1 Q. B. D. 321.

year 1849. It had, therefore, stood for twenty-seven years in the condition in which it was immediately before the accident, having had during all that time the support of the adjacent natural soil.

The right to support from the adjacent soil, and the right to lights, which are distinguished as negative easements, bear a close analogy to one another. They have often been treated as standing on the same footing, and the only distinction which can, as it appears to me, be suggested between them is, that the one is more onerous to the servient tenement than the other, for the one absolutely deprives the adjoining owner of a portion of his land for building purposes. He cannot raise any erection so near to the windows as to obstruct the light, whereas the claim to lateral support only prevents him from lessening that measure of support which the dominant tenement has enjoyed. So long as he prevents the latter from falling or sinking, which he may generally do by underpinning or other contrivance, he may use his own land as he pleases. It is to the degree, and not the kind of support that the dominant owner looks, and it is that alone to which he has gained a right. But as respects the acquisition of the right, the two claims appear to me to be identical. The owner who builds to the extremity of his land may open windows overlooking his neighbour's land. He may also lay his foundations as much or as little below the surface of his soil as he pleases. The adjoining owner cannot object or maintain any action against him for no right of his is thereby invaded. His only remedy is to build up against the windows, or take away the support which the house derives from his soil, before an adverse right has been gained: see *Cross* v. *Lewis.* (1)

All the authorities agree that a building which has acquired the status of an *ancient* building is protected from invasion of its easements of light and support. Down to the time of James I. it was the practice to prescribe for such easements as having existed from the time of legal memory (see *Bland* v. *Mosely*, (2)) and it was expressly held in *Bowry* v. *Pope* (3) that a party could not maintain an action for a nuisance in stopping the lights of his house unless he had gained a right in the lights by prescription. Theoretically

(1) 2 B. & C. 686.

(2) Cited in *Aldred's Case*, 9 Rep. 58 a.

(3) Leon. 168.

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an *ancient* house at this period was a house which had existed from the time of Richard I. Practically, it was a house which had been erected before the time of living memory, and the origin of which could not be proved. But it afterwards came to be settled law that an uninterrupted possession of light, water, or any other easement for twenty years afforded a ground for presuming a right by grant, covenant, or otherwise, according to the nature of the easement; and if there was nothing to rebut the presumption, a jury might and should be directed to act upon it. (1)

The statute 21 Jac. 1, c. 16, which limited the time of making an entry on lands to twenty years, seems to have suggested the necessity of a corresponding period for the acquisition of these easements. The earliest recorded case that I am aware of was in 1761. In that year Wilmot, J. ruled that where a house had been built forty years and had had lights at the end of it, if the owner of the adjoining ground built against them, so as to obstruct them an action lay; "and this," he said "is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties." And he added that twenty years was sufficient to give a man a title in ejectment on which he may recover the house itself, and he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house.

In 1769 the same learned judge tried an action for stopping lights which had existed for sixty years. The defendant offered to shew that the lights did not exist prior to that period, a defence which would undoubtedly have destroyed a claim by prescription, and which before the time of James I. would have been held good. But the learned judge overruled it. "If a man," said he, "has been in possession of a house with lights belonging to it for fifty or sixty years no man can stop up those lights. Possession for such a length of time amounts to a grant of the liberty of making them. It is evidence of an agreement to make them. If I am in possession of an estate for so long a period as sixty years, I cannot be disturbed even by a writ of

(1) 2 Saund. 174, note 2 by Serjeant Williams.

right, the highest writ in the law. If my possession of the house cannot be disturbed shall I be disturbed in my lights? It would be absurd." (2 Saund. 175, a.)

In a case like the present which came before Lord Ellenborough in 1803, that learned judge directed the jury as follows: "Where a man has built at the extremity of his land, and has enjoyed his building above twenty years, by analogy to the rule as to lights, &c., he has acquired a right to support or as it were of leaning to his neighbour's soil, so that his neighbour cannot dig so near as to remove that support; but it is otherwise of a house newly built." This case is quoted in 1 Selw. N. P. 10th ed. p. 435, upon the authority of Lawrence, J.

No facts are stated, and it is probable that no rebutting evidence was offered, and that this may account for the strong way in which the proposition was put. But it shews that at all events, in the absence of any such evidence, Lord Ellenborough considered the right to be established by an uninterrupted enjoyment of twenty years. In 1824 the right to lights which had been enjoyed for thirty-eight years came before the Court of Queen's Bench in *Cross* v. *Lewis* (1). In delivering judgment in favour of the right, Bayley, J. says, "I do not say that twenty years' possession confers a legal right, but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision of *Darwin* v. *Upton* (2) it has has been held that in the absence of any evidence to rebut that presumption, a jury should be directed to act upon it.—It has been argued that in order to found such a presumption it must be shewn that the first act was illegal. If so, the doctrine of presumption can never apply to windows; for a person building a house, even at the extremity of his own land may lawfully open windows looking towards the adjoining property. If his neighbour objects to them he may put up an obstruction, but that is his only remedy; and if he allows them to remain unobstructed for twenty years that is a sufficient foundation for the presumption of an agreement not to obstruct them." And Holroyd, J., who tried the case says, "At the trial I considered the windows as ancient lights, and that the plaintiff had a right by law to enjoy them; and that it was not a question to be determined by a jury without

(1) 2 B. & C. 686. (2) 2 Saund. 174 b.

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some evidence to contradict the idea of their being ancient. . . . A man may on his own land erect a house with windows looking towards his neighbour's premises. At first they may be obstructed, but if no interruption is offered, he may at length prescribe for them as ancient windows, and claim to have them free from obstruction as in *Bland* v. *Mosely*." (1)

It is not suggested in this judgment, nor in any other judgment that I am aware of, what kind of evidence would be sufficient to rebut the presumption derived from twenty years' uninterrupted possession. But this judgment plainly teaches what would not be sufficient. It would not be enough for the adjoining owner to say to the building owner, "I object to your opening windows overlooking my land." To make his objection effectual, he must follow it up by actual obstruction. "That," says Bayley, J., "is his only remedy," and Holroyd, J., added, "At first they may be obstructed, but if no interruption is offered he may at length prescribe for them as ancient windows," evidently meaning by "interruption" actual physical obstruction.

When we consider that at this period the courts were familiar with the doctrine of adverse and non adverse possession, which grew out of the statute of James I., it is not difficult to surmise what kind of evidence would be, in the minds of the judges, proper evidence to rebut the presumption derived from actual uninterrupted enjoyment. The building owner would not ask his neighbour for his permission to enable him to build his own house where and how he pleased on his own land. If he asked anything it would be that his neighbour would forbear to exercise his right to obstruct the windows he intended to open, or to take away the adjacent soil upon which his house depended for support. It was not an unusual thing before the Prescription Act for the adjoining owner to grant what was called a "lease" of the lights overlooking his premises. Many such instances have come before the Court, and one such occurs in a case now pending in this Division on a rule for a new trial. I refer to the case of *Hunt* v. *City of London Real Property Company*. Another mode of preserving the right of the adjoining owner was to exact a periodical payment from the building owner as an acknowledgment that he held his lights upon sufferance. An

(1) Cited in *Aldred's Case*, 9 Rep. 57 a.

instance is found in the remarkable case of *The Plasterers' Company* v. *The Parish Clerks' Company* (1), where it appeared that 10*s.* a year had been paid ever since the fire of London as an acknowledgment of the right of the adjoining owner to obstruct the lights when he pleased.

I conclude, therefore, that the mere absence of assent, or even the express dissent of the adjoining owner, would not prevent the right to light and support from being acquired by uninterrupted enjoyment, and that nothing short of an agreement, either express, or to be implied from payment or other acknowledgment, that the adjoining owner shall not be prejudiced by abstaining from the exercise of his right, would suffice to rebut the presumption. In other words, that it would be presumed after the lapse of twenty years, that the easement had been enjoyed by virtue of some grant or agreement, unless it were proved that it had been enjoyed by sufferance.

This was the state of the law as to this class of easements at the time the Prescription Act (2 & 3 Wm. 4, c. 71) passed. That Act by the third section distinguishes lights from all other easements, and deals with them in a different manner. It converts twenty years' actual enjoyment into a right absolute and indefeasible, "unless it shall appear that the same has been enjoyed by some consent made or given for that purpose by deed or writing." Payment of rent or other acknowledgment, therefore, no longer keeps open the right of the adjoining owner to obstruct lights, and in the case of *The Plasterers' Company* v. *The Parish Clerks' Company* (1) just mentioned, it was held that although the plaintiffs had paid the agreed acknowledgment for nearly 200 years, the right of the adjoining owner to build against them was taken away by the Act.

But the particular easement in question is not provided for by the Prescription Act. The second section points to affirmative easements only; to such as are gained by an active assertion of right in some form or other, and which are capable of being opposed in their inception. [See *Webb* v. *Bird.* (2)]

In erecting a building on his own land the owner does no more

(1) 6 Ex. 630; 20 L. J. (Ex.) 362. (C.P.) 284, affirmed in error 13 C. B. (N.S.) 841; 31 L. J. (C.P.) 336.

(2) 10 C. B. (N.S.) 268; 30 L. J.

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than make a lawful use of his own property. He makes thereby no assertion of right against his neighbour, and the latter has no power to prevent, and no right to complain of the erection.

As the writ of Right has been abolished, and the Limitation Act now in force (3 & 4 Wm. 4, c. 27), which passed subsequently to the Prescription Act, abolishes also the distinction between adverse and non adverse possession, the reasoning of Wilmot, J., has a force beyond what it had when his judgments were given.

The law of lights having been settled by the Prescription Act, any argument drawn from the Limitation Act applies only to such an easement as the one in question, which was left untouched by the Prescription Act. It seems to me to be the necessary consequence of the Limitation Act, that such an easement should be gained by a length of enjoyment commensurate with that by which a title to the house is gained. It would be a strange anomaly to hold that a title to the house should be acquired, and not a title to that which is essential to its existence—that the law which bars the owner from recovering the tenement itself after he has acquiesced in a usurped ownership by another for twenty years, yet leaves him at liberty, if he happens to be adjoining owner, to let it down and destroy it altogether, by taking away that which has been its natural support during the whole period. I cannot help thinking that the revolting fiction of a lost grant may now be discarded, in view of the necessary effect of the Limitation Act upon such an easement as this.

It is not, however, necessary in this case to base my judgment on this ground. If the right to support still rests on the doctrine of presumption, no facts are shewn which in my opinion are admissible to rebut it, for nothing is shewn except that the adjoining owner was not asked for and did not give his assent to the alteration of the house into a factory; and this, for the reasons already given, cannot, in my opinion, be held to constitute rebutting evidence. If notice to the adjoining owner that an additional burden has been cast upon his land be an ingredient, that is disposed of by the fact that the conversion of the dwelling-house into a factory, and the use of the premises as a factory during twenty-seven years, were things open and notorious.

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There are here, then, all the elements which go to make up the ordinary presumption, unmixed with any rebutting element. If such a length of enjoyment under such circumstances does not create a right to support from the adjacent soil, then no building the date of whose origin can be proved can claim it. For the common law does not present any alternative to the time of legal memory, except twenty years' enjoyment. This would be an alarming doctrine, especially at the present day, when a very small proportion of the owners of houses now standing could rest their title to support upon immemorial enjoyment.

Of the cases subsequent in date to those I have quoted, the first is *Wyatt* v. *Harrison*. (1) This was an action similar to the present, but the declaration did not allege that the house was an ancient house, or that it had existed for twenty years. To so much of the declaration as charged the digging so near to the foundation as to cause the house to fall, the defendant demurred. And the Court gave judgment in his favour. "Whatever the law might be," said Lord Tenterden, "if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance might imply the consent of the adjoining proprietor at a former time to the erection of a building in that situation, it is enough to say, that in this case the building is not alleged to be ancient, but may, as appears from the declaration, have been recently erected; and if so, then, according to the authorities, the plaintiff is not entitled to recover." The most that can be argued from this decision is that the Court seemed to be not free from doubt whether—if the house had been alleged to be ancient, the plaintiff would have been entitled to recover.

The next case in order of time is *Dodd* v. *Holme* (2), a case exactly resembling the present. The house was in fact thirty-five years old. It was alleged, in some counts, to be an ancient house, in others, to be more than twenty years old. The defence was that the plaintiff's wall was in so rotten a state that it could not have been effectually shored up; that it had only a slight foundation, and was pressed by a great weight of rubbish on the

(1) 3 B. & Ad. 871. (2) 1 A. & E. 493.

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plaintiff's premises, and that even if undisturbed, it could not have stood six months. Bolland, B., directed the jury as follows: "If I have a building on my own land, which I leave in the same state, and my neighbour digs his land adjacent, so as to pull down my wall, he is liable to an action. If, however, I had loaded my wall so that it had more on it than it could well bear, he would not be liable." And he stated the question to be whether the fall was occasioned by the defendant's negligence (not shoring up), in which case the verdict ought to be for the plaintiff, or by its own infirmity, in which case they should find for the defendants. The jury found for the plaintiff. A rule was obtained for a new trial, on the ground of misdirection, but the Court, after argument, discharged it, thus affirming the right to support. *Partridge* v. *Scott* (1) followed, in point of time, *Dodd* v. *Holme* (2). The action was brought for excavating coal on land adjoining to the plaintiff's, and so letting down two houses, the one an ancient house, the other a new one. It appeared that the plaintiff had within twenty years excavated under the ancient house, so that the question, as stated by the Court in their judgment, was precisely the same as to both houses. "In this case," said Alderson, B., in delivering the considered judgment of the Court, "if the land on which the plaintiff's house was built had not been previously excavated, the defendants might, without injury to the plaintiff, have worked the coal to the extremity of their own land, without leaving a rib of ten yards, as they have done. And if the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He has, therefore, by building on ground insufficiently supported, caused the injury to himself without any fault on the part of the defendants, unless at the time, by some grant, he was entitled to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house, because it has not existed twenty years, nor could the right to any easement have become absolute, even under Lord Tenderten's Act, until after the lapse of at least twenty years from the time when the house first stood on excavated

(1) 3 M. & W. 220. (2) 1 A. & E. 493.

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ground, and was supported in part by the defendants' land." No such point as that arises in this case. *Bonomi* v. *Backhouse* (1) involved the very point in contest here. There was a difference of opinion between the Exchequer Chamber and the Court of Queen's Bench upon the question, whether the Statute of Limitations ran from the time the excavation was made which ultimately caused the sinking, or only from the time the damage accrued to the house. The Court of Queen's Bench held that the act of excavating was itself wrongful, and that the statute ran from that time. The Exchequer Chamber held that the plaintiff had no cause of action until actual damage done, and this decision was affirmed by the House of Lords. (2) The damaged building was forty years old, and the judgment affirmed the right to support from both the adjacent and subjacent soil.

Hunt v. *Peake* (3) came before Wood, V.C., in 1860, after the decision of the Exchequer Chamber in *Bonomi* v. *Backhouse* (1), but before the decision of that case in the House of Lords. It was a bill to restrain the defendants from working any mine under the plaintiff's houses, and from working mines adjacent thereto so as to cause damage or injury to the foundations of the houses. The Vice-Chancellor came to the conclusion that the soil would have fallen if there had been no building, and therefore found it unnecessary to determine the question raised in the present case. But he says in the course of his judgment: "Suppose a person has for twenty years remained in the enjoyment of a privilege, as an ancient house, as it is called in the authorities, is he, or is he not, entitled, in consequence of having had that house for twenty years supported as it was supported, to continue to enjoy the privilege against any operations of his neighbour in the adjoining soil? Upon this, unquestionably, I do find considerable discussion.—And, perhaps, in the last authority that has been cited, namely, *Solomon* v. *Vintners' Company* (4), not only was there considerable discussion but some doubt was thrown upon it, and although it has been held in some previous authorities that the right does exist, I

(1) E. B. & E. 622; 27 L. J. (Q.B.) 378 (Ex. Ch.); 28 L. J. (Q.B.) 378.

(2) 9 H. L. C. 503; 34 L. J. (Q.B.) 181.

(3) 1 Joh. 705; 29 L. J. (Ch.) 785.

(4) 4 H. & N. 585; 28 L. J. (Ex.) 370.

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do not know that it has come clearly, pointedly, and precisely in question in the former authorities. No doubt the dicta in *Bonomi* v. *Backhouse* (1) and *Humphries* v. *Brogden* (2) are clear to the effect that you may acquire by a twenty years' acquiescence on the part of your neighbour a right to the easement, or whatever it is termed, of having the house you have added to your own soil supported by your neighbour's soil. But that doctrine has been called in question in the present case, and was called in question in the case of *Solomon* v. *Vintners' Company* (3) That case, however, was not quite of the same character, being the case of a house which leaned upon another, and had come by accident to be supported in that way."

Further on the Vice-Chancellor says, however: "If I decided upon that point (the right of the house to support) all the dicta—for I doubt whether there is any precise decision upon the question, are favourable to the plaintiffs, but I have not thought fit to rest their rights upon this state of circumstances. It is the ground that needs support," &c. Neither the cases cited in Saunders, vol. ii., nor the case before Lord Ellenborough, nor *Cross* v. *Lewis* (4) was cited before the Vice-Chancellor, nor had, as I have said, the case of *Bonomi* v. *Backhouse* (1) been heard by the House of Lords. If that case is carefully considered it can hardly be said that it is not a decision involving this very point. The question put by the House to the judges assumes the right of the plaintiffs' building to support both from subjacent and adjacent soil. It is in these words: "A. B. is the owner of a house. C. D. is the owner of a mine *under the house and under the surrounding land.* C. D. works the mine, and in so doing leaves insufficient support to the house. The house is not damaged, nor is the enjoyment of it prejudiced until some time after the workings have ceased. Can A. B. bring an action at any time within six years after the mischief happened, or must he bring it within six years after the workings rendered the support insufficient?"

It appears from the statement of facts in that case that although the defendants had worked the coal *under* the plaintiffs' house,

(1) E. B. & E. 622; 27 L. J. (Q.B.) 378 (Ex. Ch.); 28 L. J. (Q.B.) 378.
(2) 12 Q. B. 739; 20 L. J. (Q.B.) 10.
(3) 4 H. & N. 585; 28 L. J. (Ex.) 370.
(4) 2 B. & C. 686.

those workings did not cause the subsidence, but the subsidence was caused by the working away of the pillars of coal under the adjacent land. Willes, J., in delivering the judgment of the Exchequer Chamber, thus states the facts upon which the judgment of that Court was founded, and which judgment the House of Lords affirmed: "The plaintiff was owner of the reversion of an ancient house. The defendant for more than six years before the commencement of the action worked some coal mines 280 yards distant from the house. No actual damage occurred until within the last six years. The question is, is the Statute of Limitations an answer to the action?" (1) The House of Lords evidently thought it immaterial whether the workings which caused the subsidence were under or around the house, and where the surface belongs to one owner and the minerals beneath to another, in the absence of any grant, reservation, or contract, the right to vertical support must stand on the same footing as the right to lateral support: see *Rogers* v. *Taylor*. (2) Neither the adjacent soil nor the subsoil can under these circumstances be worked so as to cause the surface land to subside, nor can an artificial burden placed on the land impose a servitude upon the one or the other until the erection has stood twenty years.

I have intentionally passed by the case of *Solomon* v. *Vintners' Company* (3) as well as that of *Peyton* v. *Mayor of London* (4), because these cases appear to me to admit of other considerations than are involved in the present case. The plaintiffs here claim the support of the natural soil of the adjacent land. The plaintiffs in those cases claimed a continuance of artificial support, namely, the support of adjoining buildings, and that without shewing whether the houses were originally built by the same owner at the same time so as to be dependent on each other, or which of the two was first built, or how the one came to lean upon the other, or whether some neighbouring sewer or other excavation caused both to sink.

The Lord Chief Baron observed in *Solomon* v. *Vintners' Com-*

(1) E. B. & E. p. 654; 28 L. J. (Q.B.) 380.

(2) 2 H. & N. 828; 27 L. J. (Ex.) 173.

(3) 4 H. & N. p. 599; 28 L. J. (Ex.) 370.

(4) 9 B. & C. 725.

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pany (1) that it seemed contrary to justice and reason that a man by building a weak house adjoining to his neighbour's could, if that weak house at all got out of the perpendicular and leant upon the adjoining house, compel his neighbour, either to pull down his own house within twenty years, or to bring some action at law, the precise nature of which was not very clear, in order to prevent a right from being acquired by twenty years' enjoyment. In a subsequent case, where it appeared that the houses were built by the same owner, at the same time, and so as to require mutual support, it was held that each retained a right to the support of the other: *Richard* v. *Rose.* (2) The *Corporation of Birmingham* v. *Allen,* recently decided in the Court of Appeal (3), I mention only to shew that it has not been overlooked. That case decided that the right to support is confined to the *adjoining* land, and that where that land which, if it had been left in its natural state, would have afforded sufficient support to the plaintiffs' house, had been excavated for coals by its owner, the owner of the house could not acquire a right as against land farther off, though next adjoining to the intervening land.

The case of *Humphries* v. *Brogden* (4) and other like cases I also pass by, as they go no farther than to establish the position that the owner of surface land is entitled of common right to the support, lateral and vertical, which nature has provided for it.

For the reasons already given, and upon the authority of the cases to which I have adverted, I am of opinion that the factory in question had acquired the status of an ancient building, and that as the excavation made by the defendants was the sole cause of its falling, the defendants are responsible for the whole of the damage done.

COCKBURN, C.J. This is a case of very great importance as regards the law of easements. It is an action brought against the defendant Dalton, a builder, and the Commissioners of Works and Buildings, by whom Dalton was employed, for excavating under the soil of premises belonging to the commissioners, by

(1) 4 H. & N. p. 599; 28 L. J. (Ex.) 370.
(2) 9 Ex. 218; 23 L. J. (Ex.) 3.
(3) 6 Ch. D. 284.
(4) 12 Q. B. 739; 20 L. J. (Q.B.) 10.

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means of which an adjoining coach factory of the plaintiffs, to which they allege that they, as owners of the factory, had a right of lateral support from the soil adjacent, was caused to fall.

The facts were as follows:—The plaintiffs are the owners in fee of a coach factory at Newcastle-upon-Tyne, erected by them some twenty-seven years before the event complained of. Prior to that time the premises had been a dwelling-house, as had also been the adjoining premises, now purchased by the defendants, the commissioners, for the purpose of converting them into a Probate office. While both houses still stood, they appeared to be coeval in point of age, and there was reason to think that they had stood for about a hundred years. Though immediately contiguous there was no party-wall between them. Each, as I understand the facts, rested on its own walls, built to the extremity of the soil of the respective owner. In this state of things the plaintiffs at the time already stated, namely twenty-seven years before the alleged cause of action, altered the character of the house belonging to them, and constructed a coach factory in its place. They removed the supports on which the fabric had previously rested, and substituted for them a stack of brickwork, which they carried to the extremity of their soil, and which served at once as a chimney stack and as a support to the main girders by which the upper stories of the factory were upheld. They did this without any grant from the owner of the adjoining premises of any right of lateral support, or any assent on his part to the use of such support, unless his assent is to be inferred from his taking no steps to resist the acquisition and enjoyment of such an easement.

The Commissioners of Works having purchased the adjoining house, with the intention, as I have said, of erecting a Probate office on its site, employed the defendant Dalton to take down the house, and prepare the ground for the erection of the intended office. In doing this, according to the plans for the new office, it became necessary to take down the wall adjoining the plaintiffs' premises, and to excavate the ground to the extremity of the defendants' own soil. It was not contended on the trial that in doing this they were guilty of any negligence. They took such measures as appeared necessary to prevent any damage to the plaintiff's premises. In excavating they left a thick pillar of clay,

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which might well have been deemed sufficient for the purpose, immediately round the plaintiffs' stack, for the purpose of supporting it. But on exposure to the air the clay cracked and gave way, and the pillar, being by the excavation deprived of the lateral support which it had previously derived from the adjacent soil, gave way and fell, and, falling, brought down the factory, which, as has been said, rested mainly upon it.

It is scarcely necessary to observe that any easement of lateral support, which may have attached to the plaintiffs' premises as the house before stood, was lost by the taking down of the old house and substituting a building of an entirely different construction as regards the wall or foundation on which it rested. No question arises therefore as to whether, if the house had been reconstructed as it stood before, the right to support would still have remained. The construction of the premises as altered was entirely different. As the house previously stood the weight, if supported by the defendants' adjacent soil, was supported by the entire range of that soil. In the new building the weight rested entirely on the chimney stack, and was thus concentrated on one spot. It may well be that, if the plaintiffs' former construction had remained, the defendants' soil, notwithstanding the excavation, would have sufficed to support the building. The nature of the easement thus became essentially different, and the easement now claimed must therefore depend upon the effect of the support having been afforded during the twenty-seven years.

The only question therefore is whether by the enjoyment of the lateral support to their factory from the adjacent soil for the time stated, without more, the plaintiffs had acquired an easement which prevented the commissioners from dealing as they pleased with their own land for legitimate purposes. I am of opinion that they had not, and consequently that the defendants are not responsible for what has happened.

That the right to the lateral support of the adjacent soil for a building which has been superadded to the soil is an easement, as distinguished from the proprietary right to such support for the soil itself in its natural condition, is undoubted. Equally certain is it that, except where the positive law steps in, and, in the absence of any legal origin, gives to a fixed period of possession or

enjoyment the status of absolute and indisputable right, every easement as against the owner of the soil must have had its origin in grant. Upon both these points the authorities are uniform and positive. It is no doubt equally true that, in the absence of proof of any grant, the existence of a lost grant may be presumed from length of enjoyment. And in no system of jurisprudence has this doctrine been carried to greater lengths than in our own. In the absence of any sufficient law regulating the period of prescription, judges, to make up for this deficiency, were in the habit of directing juries to presume grants, in the past or possible existence of which no one believed—a practice to be deprecated, and, in spite of precedent, to be followed with great reserve, and certainly with no disposition to extend it.

Looking to the importance of the question here involved, and to the fact that the law as to lateral support, not having hitherto been brought before a court in banc, has not been made the subject of authoritative decision, it may be useful to trace the growth of this doctrine as to presumption and the extent to which it has been carried, and for this purpose, to review the authorities on the law of prescriptive easements.

At the common law there appears to have existed no fixed period of prescription. Rights were acquired by prescription when possession or enjoyment had existed beyond the memory of man, or where, as the legal phrase was, "the memory of man ran not to the contrary." But by several statutes, fixed periods were limited for the bringing of actions for the recovery of real estate. Prior to the Statute of Merton, Bracton tells us that the limitation in a writ of right was from the time of Henry I., that is to say from the year 1100, or 135 years (1).

By the statute of Merton (20 Hen. 3, c. 8), the limitation in a writ of right was from the time of Henry II., a period of seventy years. Writs of mort d'ancestor, and of entry, were not to pass the last return of King John from Ireland, a period of twenty-five years. Writs of novel disseisin were not to pass the first voyage of the king into Gascony, a period of fifteen years.

New periods of limitation were fixed by the Statute of Westminster, 3 Edw. 1, c. 39 (1275). By this statute the time for

(1) L. 2, f. 179.

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bringing a writ of right was limited to the time of King Richard I., a period of eighty-eight years. Writs of mort d'ancestor, of cosinage, of aiel, and of entry, were limited to the coronation of Henry III., about fifty-eight years. The writ of novel disseisin was to remain limited as before, namely, to the passage of Henry III. into Gascony.

It is plain that this statute had reference to actions for the recovery of real estate. Nevertheless the judges, with that assumption of legislative authority which has at times characterised our judicature, proceeded to apply the rule as to prescription established by the statute to incorporeal hereditaments, and, among others, to easements.

As might have been foreseen, as time went on, the limitation thus fixed became attended with the inconvenience arising from the impossibility of carrying back the proof of possession or enjoyment to a period which, after a generation or two, ceased to be within the reach of evidence. But, here again, the legislature not intervening, the judges provided a remedy by holding that if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed from time of legal memory, that is to say, from the time of Richard I. This convenient rule having been established, the judges seem not to have thought it worth while, when the statute of 31 Hen. 8, c. 2 was passed, by which in a writ of right the time was limited to sixty years, to apply, by an analogous use of that statute, the time of prescription established by it to actions involving rights to incorporeal hereditaments.

In a case of *Bury* v. *Pope* (1) in an action for stopping lights, according to the report, "It was agreed by all the justices that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and the house and the lights have continued by the space of thirty or forty years, yet the other may upon his own land and soil lawfully erect an house or other things against the said lights and windows, and the other can have no action; for it was his folly to build his house so near to the other's land; and it was adjudged accordingly."

(1) Cro. Eliz. 118.

And as late as 1 Car. 2, it was held in a case of *Sury* v. *Piggott* (1), that to maintain an action for obstructing lights, the light must be prescribed for as having been enjoyed time out of mind.

But the statute of Jac. 1, c. 21, which limited the time for bringing a possessory action to twenty years, led soon afterwards to a very important change in the law by the arbitrary adoption of that period by the Courts as sufficient to found the presumption of the existence of a right from the time of legal memory. Here, again, the boldness of judicial decision stepped in to make up for defects in the law which the supineness of the legislature left uncared for. But it is to be observed, and the observation is specially important to the present purpose, that with all their desire to reduce the period of prescription within reasonable limits, the Courts never gave greater effect to length of enjoyment than that of affording a presumption of prescriptive right, capable of being rebutted by proof of an origin at a time later than that of legal memory. Hence, if in the course of a cause it appeared that the disputed right had had a later origin, the presumption failed, and the claim of right was defeated.

The frequency of this result gave rise to a new device. As, independently of prescription, every incorporeal hereditament must have had its origin in grant, the fiction was resorted to of presuming after long user a grant by a deed which in the lapse of time had been lost. At first, to raise this presumption it was required that the user should be carried back as far as living memory would go; but after the statute of James, user for twenty years was—here again, without any warrant of legislative authority, and by the arbitrary ruling of the judges—held to be sufficient to raise this presumption of a lost grant, and juries were directed so to find in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction. Well might Sir W. D. Evans, while admitting the utility of this doctrine, say that its introduction was "a perversion of legal principles and an unwarrantable assumption of authority." (2)

Thus the law remained till the Act of 2 & 3 Wm. 4, c. 71, was passed with the view of putting an end to the scandal on the

(1) Poph. 166. (2) 2 Ev. Poth. 139.

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administration of justice, which arose from thus forcing the consciences of juries. How far it has effected this purpose will be seen further on.

But this doctrine of presumption from user or enjoyment under the former law could not, according to the highest authorities, be carried, as regarded the presumption of a lost grant, any more than that which had reference to the existence of an easement beyond time of legal memory, further than that of a presumption capable of being rebutted and so destroyed. It is true that in an early case of *Lewis* v. *Price* (1), which was an action on the case for obstructing the plaintiff's lights, where the house had been built forty years, Wilmot, J., told the jury that the action lay, saying that "this was founded on the same reason as when lights have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties." And he added, that "twenty years was sufficient to give a man a title in ejectment, in which he might recover the house itself: and he therefore saw no reason why it should not be sufficient to entitle him to any easement belonging to the house."

So, in a subsequent case of *Dougal* v. *Wilson* (2), which was also an action for obstructing lights, on the defendant's attempting to shew that the lights had not existed for more than sixty years, the same judge said, "If a man has been in possession of a house, with lights belonging to it, for fifty or sixty years, no man can stop up those lights. Possession for such a length of time amounts to a grant of the liberty of making them; it is evidence of an agreement to make them. If I am in possession of an estate for so long a period as sixty years, I cannot be disturbed even by a writ of right —the highest writ in the law. If my possession of the house cannot be disturbed, shall I be disturbed in my lights? It would be absurd." He adds, "And I should think a much shorter time than sixty years might be sufficient." From this language it would no doubt appear that the learned judge considered that, after such a length of possession as would be a bar to an action to recover an estate under the statutes of Henry VIII. or James I., the presumption in favour of a grant in the case of an easement would become absolute. But this view of the law was corrected in the case of

(1) 2 Sir E. Williams' Saund. 504, note. (2) 2 Sir E. Williams' Saund. 504

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Darwin v. *Upton* (1), which came before the Court of King's Bench on a motion for a new trial in an action which had been tried before Gould, J., in which it was alleged that the learned judge had directed the jury that twenty-five years' possession was an absolute bar, incapable of being overturned by any contrary proof, whereas it was only a presumptive proof which might be explained away. Lord Mansfield, in giving judgment, explains the value and effect of presumptions of this nature, and places the doctrine on its true footing. He says, "The enjoyment of lights with the defendants' acquiescence for twenty years is such decisive presumption of a right by grant or otherwise that, unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an *absolute bar*, like a Statute of Limitations; it is certainly a presumptive bar which ought to go to a jury. Thus, in the case of a bond there is no Statute of Limitations that bars an action upon it, but there is a time when a jury may presume the debt to be discharged, as if no interest appear to have been paid for sixteen or twenty years. The same rule prevails in the case of a highway. Time immemorial itself is only presumptive evidence, for so it was held in the case of *The Mayor of Kingston-upon-Hull* v. *Horner* (2). In a case before me at Maidstone, I held length of time, when unanswered and unexplained, to be a bar." Willes, J., said, "There was a case before me at York, where I held uninterrupted possession of a pew for twenty years to be presumptive evidence merely, and that opinion was afterwards confirmed in the Court of Common Pleas." And Buller, J., says, "I incline very much to think that the judge was misunderstood, for he could never call it an absolute bar. In the *Wells Harbour Case*, this Court went fully into the doctrine, and the rule of law is clear that length of time is presumptive evidence only. The judge said, 'I think twenty years' uninterrupted possession of these windows is a sufficient right for the plaintiff's enjoyment of them.' Now, that expression is open to a double construction. If the judge meant it was an absolute bar, he was certainly wrong, if only as a presumptive bar, he was right."

The learned editor adds that the next day Buller, J. said that Ashurst, J. had waited on Mr. J. Gould, who said he had never

(1) 2 Sir E. Williams' Saund. 506. (2) Cowp. 102.

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had an idea but it was a question for a jury, and would have left it to the jury if the counsel for the defendant had asked it; that he compared it to the case of trover, where a demand and refusal are evidence of, but not an actual conversion. Upon this the rule was discharged.

In the case of *The Mayor of Hull* v. *Horner* (1), just referred to, Lord Mansfield thus explains the law: "There is a great difference between length of time, which operates as a bar to a claim, and that which is only used by way of evidence. A jury is concluded by length of time that operates as a bar; as where the Statute of Limitations is pleaded in bar to a debt; though the jury is satisfied that the debt is due and unpaid it is still a bar. So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription if there would be a legal commencement of the right. But any written evidence shewing that there was a time when the prescription did not exist is an answer to a claim founded on prescription. But length of time, used merely by way of evidence, may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other, according to circumstances."

In *Keymer* v. *Summers* (2), Yates, J., told the jury that thirty years' user of a right of way would afford a presumption of a right of way; but he put it no higher. It is true that in two cases, the first that of *Balston* v. *Bensted* (3), at Nisi Prius, the other that of *Bealey* v. *Shaw* (4), in banc, Lord Ellenborough laid it down that "twenty years' exclusive enjoyment of water in any particular manner afforded a conclusive presumption of right in the party so enjoying it derived from grant or Act of Parliament." But the decision in the latter case, which is expressly disapproved of by Lord Wensleydale in *Chasemore* v. *Richards* (5), turned on the particular facts; and the law as there laid down by the Chief Justice is not in accordance with the current of authorities, and is scarcely consistent with his own language in *Campbell* v. *Wilson*. (6) In that case a way had been used for twenty years, but must have

(1) 1 Cowp. 102, at p. 108.
(2) Bull. N. P. 74.
(3) 1 Camp. 463.
(4) 6 East, 208.
(5) 7 H. L. C. 386; 29 L. J. (Ex.) 81.
(6) 3 East, 294.

originated within thirty-seven years, as at that time all ways had been extinguished under an award, except such as were therein set out, of which the way in question was not one, and there was some reason to think on looking at the award that the way in question had been used by mistake, but there was no evidence to shew that this was so; and the Chief Justice at the trial left "in substance the question to the jury whether the enjoyment originated in a grant or in any other manner." A new trial having been applied for on the ground of misdirection, Lord Ellenborough says, "Though by possibility the parties might, in fact, have acted on the mistake of the award, yet on the evidence given nothing appears to show that they referred their acts to the award, and, therefore, it comes to the common case of adverse enjoyment of a way for upwards of twenty years, without any thing to qualify that adverse enjoyment. On looking into the award we might possibly suppose that the use of the way originated by mistake, but no evidence was given of any fact accompanying the enjoyment to show that the parties acted upon such a mistake. There was, therefore, no reason why the jury should not make the presumption as in other cases, that the defendant acted by right, and that was in substance the direction of the learned judge." From this language the Chief Justice would appear to have treated the presumption arising from user as capable of being rebutted by the other circumstances of the case if the evidence had warranted it. Grose, J., said, "I cannot say that upon this evidence, the jury might not make the presumption which they have done, though had I been one of them, I do not know that I should have dared to do so." And Lawrence, J., said, "No doubt adverse enjoyment of a right of way for twenty years unexplained is evidence sufficient for the jury to found a presumption that it was a legal enjoyment, and such in effect was the opinion of the learned judge in his direction to them." "If in exercising the right of way from time to time it had appeared that the party had asserted his right to be grounded on the award, though it was exercised ever so adversely, I do not know how the jury would be warranted in referring it to any other ground than what the party himself insisted on at the time. The weak part of the plaintiffs' case is that it does not appear by the evidence that the enjoyment of the way did arise

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from mistake. Then if there were an adverse possession for above twenty years, and not explained by any evidence, why might not the jury presume a grant?"

In *Cross* v. *Lewis* (1), which was an action for obstructing ancient lights, and in which the lights were proved to have existed for thirty-eight years, Bayley, J., when the case was before the Court of King's Bench, on a rule nisi to enter the verdict for the defendant, says: "I do not say that twenty years' possession confers a legal right; but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision in *Darwin* v. *Upton* (2), it has been held that in the absence of any evidence to rebut that presumption, a jury should be told to act upon it." Littledale, J., says, "The facts were sufficient to raise the presumption of a grant." Holroyd, J., who had tried the cause at Nisi Prius, says, "At the trial I considered the windows in question as ancient lights, and that the plaintiff had by law a right to enjoy them, and that it was not a question to be determined by the jury without some evidence to contradict the idea of their being ancient lights." "A man may on his own lands erect a house with windows looking towards his neighbour's premises. At first they may be obstructed, but if no interruption is offered he may at length prescribe for them as ancient windows." The learned judge was here evidently confounding two distinct things, prescription, which in theory required to be carried back to time of legal memory, but might be presumed from enjoyment to have had so long an existence, and an easement founded on the presumption of a lost grant, which was the matter before the Court; but he admits that if "evidence to contradict the idea of the windows being ancient lights had been offered, it would have been matter for the jury."

In a still later case, that of *Livett* v. *Wilson* (3), in an action of trespass, the defendant pleaded in justification a right of way acquired by lost grant. On the trial it appeared that the premises occupied by the plaintiff and the defendant had formerly been in the hands of a single owner, who had conveyed part to a person

(1) 2 B. & C. 686. (2) 2 Wm. Saund. 175 b.

(3) 3 Bing. 115.

under whom the defendant claimed, but the right of way asserted was not reserved in the conveyance. There was also some conflict of evidence as to the undisputed user of the way, but the weight of evidence on this point shewed that the right had generally been contested. On this evidence the judge left it to the jury to say whether there had been uninterrupted user for more than twenty years by virtue of a deed, and that such deed had been lost, in which case they should find for the defendant; but if they thought no way had been granted by deed, they should find for the plaintiff. On an application for a new trial, Best, C.J., uses this emphatic language: "I think that the direction of the learned judge was perfectly right, and that he went far enough. I do not dispute that if there had been an uninterrupted usage for twenty years, the jury might be authorized to presume it originated in a deed; but even in such a case a judge would not be justified in saying that they *must*, but they *may*, presume the deed. If, however, there are circumstances inconsistent with the existence of a deed, the jury should be directed to consider them, and to decide accordingly."

The case of *Doe* d. *Fenwick* v. *Reed* (1) is not directly in point to the present, yet it is analogous to it, and it deserves attention on account of a dictum of Holroyd, J. It was an action of ejectment to recover property, into the possession of which the defendant's ancestor had been admitted as a creditor, after a judgment obtained against the then owner, more than half a century before, till the debt should be satisfied, and his family had remained in possession ever since. Abbott, C.J., in giving judgment, said: "I am clearly of opinion that the direction was according to law. In cases where the original possession cannot be accounted for, and would be unlawful unless there had been a grant, the rule may, perhaps, be different, and the cases cited are of that description. Here the original possession is accounted for, and is consistent with the fact of there having been a conveyance. It may, indeed, have continued longer than is consistent with the original condition. But it was surely a question for a jury to say whether that continuance was to be attributed to a want of care and attention on the part of the Charlton family, or to the fact of there having been a conveyance of the estate. As the defendant's ancestors

(1) 5 B. & A. 232.

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had originally a lawful possession, I think it was incumbent on him to give stronger evidence to warrant the jury in coming to a conclusion that there had been a conveyance." And Holroyd, J., said: "Here the original enjoyment was consistent with the fact of there having been no conveyance, for it was in satisfaction of a debt. The true question was presented to the jury. In cases of rights of way, &c., the original enjoyment cannot be accounted for unless a grant has been made; and therefore it is that from long enjoyment such grants are presumed. But even in these cases, evidence to rebut such a presumption would be admissible."

The text writers are quite in accordance with these dicta and decisions. "The presumption of right in such cases," says Mr. Starkie (1), "is not conclusive; in other words, it is not an inference of mere law, to be made by the Courts, yet it is an inference which the Courts advise juries to make wherever the presumption stands unrebutted by contrary evidence." "This presumption," says Mr. Best in his work on Evidence (2), "only obtains its practically conclusive character when the evidence of enjoyment during the required period remains uncontradicted and unexplained." "The presumption of right," says the same learned author (s. 379) (referring to what had been said by Lord Ellenborough in *Balston* v. *Bensted* (3), and *Bealey* v. *Shaw* (4)), "from twenty years' enjoyment of incorporeal hereditaments, is often spoken of as a conclusive presumption, an expression almost as inaccurate as calling the evidence a 'bar.' If the presumption be 'conclusive' it is a presumptio juris et de jure, and not to be rebutted by evidence, whereas the clear meaning of the cases is that the jury ought to make the presumption, and act definitely upon it, unless it is encountered by adverse proof." And in his work on Presumptions, the same learned writer, speaking of presumptions from user, writes: "This presumption only obtains its practically conclusive character when the evidence of enjoyment during the required period remains uncontradicted and unexplained;" in support of which proposition he refers to *Livett* v. *Wilson*. (5) Mr. Taylor, in his valuable work on Evidence (p. 795), classes the presumption arising from user

(1) 3 Stark. Ev. p. 911, 3rd ed.
(2) Best on Evidence, sect. 380.
(3) 1 Camp. 462.
(4) 6 East, 208.
(5) 3 Bing. 115.

and enjoyment among what he terms "*disputable*" presumptions. "These," he says, "as well as the former"—that is conclusive presumptions—"are the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion or the effect of the other. The connection, however, in this class is not so intimate or so uniform as to be conclusively presumed to exist in every case, yet it is so general that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other in the absence of all opposing evidence. In this mode the law defines the nature and amount of the evidence which is sufficient to establish a primâ facie case, and to throw the burthen of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favour of the presumption. A contrary verdict might be set aside as being against evidence."

"The rules in this class of presumptions," says Mr. Greenleaf (1), "as in the former, have been adopted by common consent, from motives of public policy, and for the promotion of the general good, yet not, as in the former class, forbidding all further evidence, but only dispensing with it till some proof is given on the other side to rebut the presumption raised."

The true principle is, as it seems to me, correctly stated in Mr. Goddard's learned and able treatise on the Law of Easements, p. 90. "The whole theory of prescription depends upon the presumption of a grant having been made. If, therefore, it can be shewn that no grant could have been legally made, or that any easement lawfully created must have been subsequently extinguished by unity of seisin or otherwise, or if it can be shewn to be a very improbable thing that a grant ever was made, the presumption cannot arise, and the title by prescription fails."

An instance in which such a presumption failed is to be found in the case of *Barker* v. *Richardson*. (1) There lights had been enjoyed for more than twenty years over land which during part of the time had been glebe land. The defendant, a purchaser under 55 Geo. 3, c. 147, had obstructed the lights. It was held that a grant could not be presumed, inasmuch as the rector, being only tenant for life, was incompetent to grant such an easement.

(1) On Evidence, p. 734. (2) 4 B. & A. 579.

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The books are strikingly deficient in decisions on the subject of the easement of lateral support. I have been able to find only two cases prior to the passing of 2 & 3 Wm. 4, c. 71, in which the right has directly come in question. In some other cases which have occurred it has been coupled with the question of negligence, and the decisions have had reference to the latter question. The subject is treated of in *Palmer* v. *Fleshees* (1) (referred to in Com. Dig., Action on the case for Nuisance, C). The action, indeed, was for stopping up lights, the facts being that a man, having a piece of land, built a house on part of it, and sold the house to the plaintiff, and then sold the rest of the land to the defendant, who, building thereon, obstructed the plaintiff's lights; and it was held that the action lay. In the course of the cause it was resolved by the judges: (1.) that if a man, being seised of land, leases forty feet to A. to build a house thereon, and forty feet to B. for a like purpose, and one of them builds a house, and then the other digs a cellar in his land which causes the wall of the first adjoining house to fall, no action will lie, for every one may deal with his own to his best advantage; but, "semble," that it would be otherwise if the wall or house were an ancient one. (2.) That if a man, having a piece of land, builds a house on part of it, and leases the house to one, and the other part of the land to another, neither the lessor, nor any one claiming under him, can stop up the lights, for otherwise it would be in the power of the lessor to frustrate his own grant. Aliter, if the land adjoining a house is the land of a stranger, for the latter may build on his own land, and the owner of the first house will be without remedy unless such house were an ancient house, and the lights ancient lights. The case does not, however, say what length of time will constitute a house or lights "ancient," nor does it touch the subject of presumption.

No case in which the subject of support comes directly into question occurs till that of *Stansell* v. *Jollard*, in 1803, which is shortly stated in Selwyn's Nisi Prius, vol. i., p. 445, from the MS. of Mr. Justice Lawrence. "In an action on the case," it is there said, "for digging so near to the gable end of the house of the plaintiff, let to a tenant, that it fell, Lord Ellenborough held that where, as in the case before the Court, a man had built to

(1) Sid. 167.

the extremity of his soil, and had enjoyed his building above twenty years, by analogy to the case of lights, &c., he had acquired a right to a support, or, as it were, of leaning to his neighbour's soil, so that his neighbour could not dig so near as to remove the support, but that it was otherwise of a house, &c., newly built." From the language of this statement it would certainly appear that Lord Ellenborough treated the twenty years as conclusive. But the report is a very meagre and unsatisfactory one, depending entirely on the accuracy of Mr. Justice Lawrence's note. The decision appears to have occurred at Nisi Prius. The probability is, as there does not appear to have been anything to rebut the presumption arising from the twenty years' enjoyment, that the judge told the jury they must act upon such a presumption as one obtaining in the case of lights and other easements. To have gone further would have been to go beyond the necessity of the case. I cannot help looking upon this case of *Stansell* v. *Jollard*, as one of very doubtful authority. I observe that it has since been questioned in the case of *Solomon* v. *Vintners' Company*. (1)

In some later cases, as I before mentioned, the complaint of the withdrawal of support was founded, not on the right of support absolutely, but on the allegation of negligence in removing the adjoining building. Thus, in *Massey* v. *Goyder* (2) the grievance complained of was the taking down an adjoining building, and digging the foundations of a new building erected in its place, without giving due and proper notice to the plaintiff, the owner of an adjoining house, so as to give him the opportunity of taking precautionary measures, as also in respect of negligence in taking down the first building and in excavating. It was there held by Tindal, C.J., that if the defendants had used reasonable and ordinary care in the doing of the work, having given due notice to the plaintiff, they would not be answerable in point of law for damage caused to the plaintiff's premises. In *Brown* v. *Windsor* (3), which was an action for excavating under the defendants' wall, on which the plaintiff's house, built twenty-seven years before, rested, the complaint was of negligence in the manner in which the work had been carried on, besides which there was proof that the

(1) 4 H. & N. 585; 28 L. J. (Ex.) 370. (2) 4 C. & P. 161.
(3) 1 Cr. & J. 20.

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defendant had expressly authorized the resting of the plaintiff's house on his wall. So in *Dodd* v. *Holme* (1) the question on which the decision turned was the allegation and proof of negligence. In *Peyton* v. *Mayor of London* (2) the cause of action relied on was that the defendant, by taking down his house adjoining that of the plaintiff without shoring up, had injured the plaintiff's house. It was held that, as the plaintiff had not alleged or proved any right to have his house supported by the defendant's house, the defendant was not liable for what had happened. In *Walters* v. *Pfeil* (3) the complaint was of negligence in taking down the defendant's house, whereby the plaintiff's house was injured. There was no question as to support from the adjacent soil. In none of these cases did the right to lateral support come into question; and though some of them have been cited in support of the plaintiff's case, I cannot see that they have any bearing on the question before us.

I am very far from saying that when houses or buildings have stood for many years, especially when they appear to be of equal age, the presumption of a reciprocal easement of lateral support ought not to be made. It may reasonably be inferred that they were built under any of the circumstances from which, at the present time, a grant would properly be implied. Thus they may have been built by one owner, or under a common building lease, or if built by different owners, where some arrangement for mutual support was come to. Thus, had the plaintiff's premises remained in their original condition, I should have been prepared to make the necessary presumption to uphold the right. Where land has been sold by the owner for the express purpose of being built upon, or where, from other circumstances, a grant can reasonably be implied, I agree that every presumption should be made and every inference should be drawn in favour of such an easement, short of presuming a grant when it is undoubted that none has ever existed. But in the absence of any such circumstances there is no form of easement in which, as it seems to me, the doctrine of presumption should be more cautiously and sparingly applied than the easement of lateral support. For this easement is obviously one of a

(1) 1 A. & E. 493. (2) 9 B. & C. 729.
(3) 1 M. & M. 362.

very anomalous character. In every other form of easement the party whose right as owner is prejudicially affected by the user has the means of resisting it if illegally exercised. In the case of the so-called "affirmative" easements he can bring his action, or oppose physical obstruction to the exercise of the asserted right. Even in the case of another negative easement, and which is said to approach the more nearly to this—that of light—the supposed analogy entirely fails. For although no action can be brought against a neighbouring owner for opening windows overlooking the land of another, there is still the remedy, however rude, of physical obstruction by building opposite to them. But against the acquisition of such an easement as the one here in question the adjoining owner has no remedy or means of resistance,—unless, indeed, he should excavate in his own immediately adjacent soil while the neighbouring house is being built or before the easement has been fully acquired, for the purpose of causing the house to fall. But what would be thought of a man who thus asserted his right? Or, possibly, as in the present instance, he may have built to the extremity of his own land, and may require the support of his soil to uphold his own house. Is he to endanger and perhaps destroy his own house by excavating under it for the purpose of preventing his neighbour from acquiring the right of support? The question, as it seems to me, answers itself. To say that by reason of an adjoining house being built on the extremity of the owner's soil a right of support is to be acquired in the absence of any grant or assent, express or implied, against the adjacent owner, who may be altogether ignorant whether the house or other building is supported by his soil or not, and who, whether he knows it or not, has no means of resisting the acquisition of an easement against himself, either by dissent or resistance of any kind, appears to me to be repugnant to reason and common sense, as well as to the first principles of justice and right.

For these reasons I cannot entertain a doubt that—at all events as the law stood before the passing of the Prescription Act, 2 & 3 Wm. 4, c. 71—the presumption of a grant, if any, arising in this case from the support to the plaintiff's premises having been had for the twenty-seven years, was open to be rebutted; and that

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when it was proved—or, what is the same thing, admitted—that when the plaintiff's premises were rebuilt—the original easement, if any, being, as I have already pointed out, gone—the assent of the defendant's predecessors was not asked for or obtained by grant, or in any other way, to any support being derived from their soil, the presumption was at an end.

We have then to consider whether any alteration in the law as applicable to this case has been introduced by the statute just referred to. First, does the statute apply to the presumption of a lost grant at all? Secondly, if it does, does it apply to the easement under consideration? Thirdly, if it does, is the right of the party interested to rebut the presumption, by proving that no grant ever existed, taken away?

Now, it is first to be observed that the Act professes to deal with the matter of prescription alone. It is entitled, "An Act for Shortening the Time of Prescription in certain Cases;" and what is here meant by "prescription," if it admitted of any doubt, is immediately made apparent by the preamble, which is in these words: "Whereas the expression 'time immemorial,' or time whereof the memory of man runneth not to the contrary, is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard I., whereby the title to matters that have been long enjoyed is sometimes defeated by shewing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof, be it enacted," &c. Then come the remedial enactments of this strange and perplexing statute. What was wanted was a fixed period of prescription, such as is to be found in the French and Italian Codes, in which for easements at once continual and apparent a prescriptive period of thirty years is fixed; in all others the right can only be founded on positive proof of title, unless arising from the disposition of a common owner. See Articles 688–707 of the French Code, and Articles 629–630 of the Italian Code. Thus fictitious presumptions, with us the arbitrary creation of the courts, and repugnant at once to common sense and to the consciences of judges and juries, are altogether got rid of.

But while this period of prescription is fixed by the statute

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at the longer period of sixty years in the case of rights of common and other profits à prendre, and of forty years in the case of easements, unless in either case it appears that the enjoyment had been had under some deed or writing, with regard to any intermediate period it was enacted that, after an enjoyment for twenty years without interruption by any person claiming right, no claim shall be defeated by shewing only that the enjoyment commenced earlier than the twenty years. To both enactments is however appended the important provision that "such claim may be defeated in any other way by which the same is now liable to be defeated."

By this roundabout, and it must be admitted, somewhat clumsy contrivance, so far as prescriptive rights were concerned, the presumption arising from twenty years' user or enjoyment was rendered a presumptio juris et de jure, and conclusive. But as regards the presumption of a lost deed in rights arising from supposed grant, although the statute may have introduced easements created by grant for the purpose of making such rights indefeasible by prescription at the end of forty years, it is difficult to see how the presumption arising from an enjoyment for twenty years can be in any way affected by the Act. For such a presumption was never liable to be rebutted by evidence of a still earlier user, which is the inconvenience which the statute professes to remedy. On the contrary, the effect of such proof could obviously only be to strengthen the presumption. The Act does not go the length of saying that the twenty years' user in the case of easements shall have any greater effect than it had before. It is only to the exceptional easement of light that it has given the character of indefeasibility at the expiration of the twenty years of uninterrupted enjoyment,—a special enactment which would have been wholly unnecessary if the effect of the general enactment had been to make all easements indefeasible at the end of twenty years. The only conclusion, therefore, at which I can arrive is that, as regards the effect of twenty years' user or enjoyment in the matter of easements by presumed grant, the law stands exactly as it did before the passing of the Act.

But, secondly, is the easement we are dealing with within the Act? The Act requires that the user or enjoyment shall have

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been under a "claim of right" and "uninterrupted." A man builds a house on his own land. He may lay the foundations so deep as not to need the support of his neighbour's soil, or he may not do so, and the support may be needed; but in the latter case the neighbour may not be aware of it, and there is nothing to convey to him the knowledge that the support is in fact had, nor if he knew it has he any means practically of preventing it. Is this an enjoyment "of right" within the 1st and 2nd sections of the Act, according to the meaning put upon the term by this Court in *Tickle* v. *Brown?* (1)

Again, the enjoyment is required to be uninterrupted. Now, interruption may arise either from a disuser by the one party or from physical obstruction opposed by the other. I take the statute to have contemplated interruption as arising from either cause. Can it have been intended to include a form of easement to which no interruption could be opposed by the party whose rights are to be prejudicially affected? But the answer to the third question may render the foregoing one unimportant. Does the statute take away the right of the party denying the grant to rebut the presumption arising from user? I answer most assuredly not. For it says expressly that "the claim may be defeated in any other way by which the same is now" (that is, by the then existing law), "liable to be defeated." Now, nothing can, I think, be more certain, for the reasons I have before given, and from the authorities I have cited, than that the presumption of a lost grant from twenty years' user was under the previous law capable of being rebutted, and so the claim defeated, by proof that no grant had ever existed.

I find nothing in the decisions which have taken place since the statute which shakes my confidence in the view I have expressed. The mining cases, such as *Humphries* v. *Brogden* (2), *Harris* v. *Ryding* (3), *Rogers* v. *Taylor* (4), *Rowbotham* v. *Wilson* (5), *Bonomi* v. *Backhouse* (6), are not at all in point. The right of support there claimed was not of lateral but of vertical support, and was not

(1) 4 A. & E. 369.
(2) 12 Q. B. 739; 20 L. J. (Q.B.) 10.
(3) 5 M. & W. 60.
(4) 2 H. & N. 828; 27 L. J. (Ex.) 173.
(5) 8 H. L. C. 348; 30 L. J. (Q.B.) 49.
(6) E. B. & E. 355; 9 H. L. C. 503; 34 L. J. (Q.B.) 181.

in the nature of an easement but of a proprietary right—the right of the owner of the surface land to have the support of the strata below as of absolute right, independently of user or of right acquired by enjoyment. This distinction was expressly pointed out by Lord Wensleydale when the case of *Bonomi* v. *Backhouse* (1) was before the House of Lords. He says, "I think it perfectly clear that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighbouring property not to interrupt that enjoyment."

The case of *Brown* v. *Robins* (2) comes nearer to the present, but nevertheless is plainly distinguishable. It was an action for excavating beneath land adjoining the plaintiff's house, and so causing the fall of the house which had been built on land previously excavated beneath the surface, and which the defendants knew to have been so excavated. The plaintiff was held entitled to recover;—to my mind a very questionable decision—but only on the express finding of the jury that the land would equally have sunk if no building had been superadded to its weight.

The case of *Partridge* v. *Scott* (3) is still nearer to the present, and the language of the Court with reference to the easement claimed, which was one of support, is deserving of observation with reference to the case before us. The plaintiff had built a house on land which had been previously excavated by mining below. Four years after the house was built the defendants in working a mine immediately adjoining removed the minerals which afforded lateral support to the plaintiff's house, without leaving sufficient to uphold it, but the removal of the minerals would not have had that effect if the house had not been built on excavated soil. It was held that no right of support could be claimed under such circumstances, except by way of easement, which of course could not have been acquired under twenty years; the language of the Court leaving it doubtful whether in their opinion if the support had been had for the twenty years a right thereto would have been acquired. In delivering the judgment, Baron Alderson says, "He

(1) 9 H. L. C. 503; 34 L. J. (Q.B.) 181.

(2) 4 H. & N. 186; 28 L. J. (Ex.) 250.

(3) 3 M. & W. 220.

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(the plaintiff) has, by building on ground insufficiently supported, caused the injury to himself without any fault on the part of the defendants, unless at the time by some grant he was entitled to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house because it has not existed twenty years, nor as to the old house because though erected more than twenty years it does not appear that the coal under it may not have been excavated within twenty years, and no grant can at all events be inferred, nor could the right to any easement become absolute even under Lord Tenterden's Act, until after the lapse of at least twenty years from the time when the house first stood on excavated ground, and was supported in part by the defendant's land. If the law stood as it did before Lord Tenterden's Act (2 & 3 Wm. 4, c. 71, s. 2), we should say that such a grant ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts. And even since that Act the lapse of time under these peculiar circumstances would probably make no difference. For the proper construction of that Act requires that the easement should have been enjoyed for twenty years under a claim of right. Here neither party was acquainted with the fact that the easement was actually used at all; for neither party knew of the excavation below the house. We should probably, therefore, have been of opinion that there was no user of the easement under a claim of right, and that Lord Tenterden's Act, therefore, would not apply to a case like this. However, the facts of this special case do not raise that point."

The case of *Rogers* v. *Taylor* (1) is still nearer to the point. The plaintiff, having built two cottages on waste belonging to the Crown in the year 1824, obtained a grant of the surface from the Crown exclusive of the minerals. In 1853 the defendant, who as tenant of the owner of the mines was working a quarry underneath the house, cut away the supports of the roof of the quarry under the house, which caused the house to fall. The judge at the trial left it to the jury, from the enjoyment of the support for upwards of twenty years, if they thought the enjoyment had been

(1) 2 H. & N. 828; 27 L. J. (Ex.) 173.

uninterrupted—which was a question in the cause—to presume a grant from the owner of the quarry, and this direction was held by the Court of Exchequer to be right. But in this direction, which was given in deference to previous decisions, and which I now think went to the extreme verge of the law—for no one could have believed in the reality of such a grant—the effect of the enjoyment was only put as a matter of presumption. There is nothing to lead to the inference that, had there been rebutting evidence, it ought not to have been submitted to the jury.

The only case which would appear to be adverse to this view is that of *Hide* v. *Thornborough* (1), in which Parke, B., at Nisi Prius, held that where the house of the plaintiff had been supported by the adjoining land of the defendant for twenty years to the knowledge of the defendant, the house of the plaintiff had acquired a right to such support, so as to give the plaintiff a right to damages for injury to his house by its withdrawal. But it is to be observed that this was a decision at Nisi Prius, and which does not appear to have undergone much consideration, and, what is more important, there was no evidence to shew the origin of the user or to rebut the presumption arising from the continuance of the support and so to negative, as is the case here, the presumption of a grant.

The same learned judge in *Gayford* v. *Nicholls* (2) uses language which might imply an opinion that twenty years' enjoyment would give an absolute right to support. There the plaintiff's buildings had been injured by excavations made in the defendant's soil; but the buildings were modern, and it was held that the plaintiff could not recover. Parke, B., in delivering judgment says: "This is not a case in which the plaintiff has the right of the support of the defendant's soil either by virtue of a twenty years' occupation, or by reason of a presumed grant, or by a presumed reservation, where both houses were originally in the possession of the same owner; for unless a right of support by some such means can be established, the owner of the soil has no right of action against his neighbour who causes the damage by the proper exercise of his own right." But this was obiter dictum, and not necessary to the decision. The case of *Arkwright* v. *Gell* (3) is an authority

(3) 2 C. & K. 250.

(1) 9 Ex. 702; 23 L. J. (Ex.) 205.

(3) 5 M. & W. 203.

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on this question, as well as on the question of presumption. It was an action for diverting from certain cotton mills water flowing down a mineral sough, and of which the mills had for many years had the benefit. The stream was an artificial not a natural one. In giving the judgment of the Court, the Lord Chief Baron says, and his language is well worthy of attention: "What is the species of right or interest which the proprietor of the surface where the stream issued forth, or his grantees, would have in such a watercourse at common law, and independently of the effect of user under the recent statute 2 & 3 Wm. 4, c. 71? He would only have a right to use it for any purpose to which it was applicable, so long as it continued there. A user for twenty years or a longer time would afford no presumption of a grant of the right to the water in perpetuity; for such a grant would in truth be neither more nor less than an obligation on the mine owner not to work his mines by the ordinary mode of getting minerals below the level drained by that sough, and to keep the mines flooded up to that level in order to make the flow of water constant for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine owners could have meant to burthen themselves with such a servitude so destructive to their interests—and what is there to raise an inference of such an intention? The mine owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favour of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level and thus taking away the water entirely, a course so expensive and inconvenient that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights to infer from the abstinence from such an act an intention to grant the use of the water in perpetuity, as a matter of right." The learned judge next proceeds to consider the case with reference to Lord Tenterden's Act. "It remains to be considered whether the statute 2 & 3 Wm. 4, c. 71, gives to Mr. Arkwright and those who claim under him any such right, and we are clearly of opinion that it does not. The whole purview of the Act shows that it applies only to such rights as would before the Act have been

acquired by the presumption of a grant from long user. The Act expressly requires enjoyment for different periods, 'without interruption,' and therefore necessarily imports such an user as could be interrupted by some one 'capable of resisting the claim,' and it also requires to be 'of right.' But the use of the water in this case could *not be the subject* of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford Sough, and was incapable of interruption by them at any time during the whole period by any reasonable mode, and as against them it was not 'of right;' they had no interest to prevent it; and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water so long as their mines were freed from it." This reasoning as it seems to me, implies that the presumption arising from user may be negatived by the surrounding circumstances; more especially where the user could not be interrupted by the party against whom the easement is claimed. In the case before us the neighbouring owner could not bring an action; he could not interrupt the user by anything he could do or could reasonably be expected to do.

As regards the matter of presumption, *Chasemore* v. *Richards*, in the House of Lords (1), is very much to the present purpose. It was an action for intercepting, by the formation of a reservoir on the defendant's own land, and the use of mechanical appliances, currents of water, which before ran underground, and percolating through the soil, fed the stream of the river Wandle, on which the plaintiff had an ancient mill worked by the stream, the supply of water to the mill being thereby diminished. In delivering the opinion of the judges, which was adopted by the House of Lords, Wightman, J., says:—"In such a case as the present, is any right derived from the use of the water of the river Wandle for upwards of twenty years for working the plaintiff's mill? Any such right against another, founded upon length of enjoyment, is supposed to have originated from some grant from the owner of what is sometimes called the servient tenement. But what grant can be presumed in the case of percolating waters depending upon the quantity of rain falling, or the natural moisture of the soil? and

(1) 7 H. L. C. 370; 29 L. J. (Ex.) 83.

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in the absence of any visible means of knowing to what extent, if at all, the enjoyment of the plaintiff's mill would be affected by any water percolating in and out of the defendant's or any other land? The presumption of a grant arises only where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could he prevent or stop the percolation of the water?"

So here I ask how could the adjoining owner prevent the plaintiffs' building from pressing laterally on his soil? Lord Wensleydale afterwards says (Ibid. p. 385): "I do not think that the principle on which prescription rests can be applied. It has not been with the permission of the proprietor of the land that the streams have flowed into the river for twenty years or upwards. 'Qui non prohibet quod prohibere potest assentire videtur.' But how, here, could he prevent it? He could not bring an action against the adjoining proprietor; he could not be bound to dig a deep trench in his own land to cut off the supplies of water in order to indicate his dissent. It is going very far to say that a man must be at the expense of putting up a screen to window lights, to prevent a title being gained by twenty years' enjoyment of light passing through a window. But this case would go very far beyond that. I think that the enjoyment of the right to these natural streams cannot be supported by any length of user if it does not belong of natural right to the plaintiff. For the same reason I dispute the correctness of Lord Ellenborough's opinion in the case of the spring in *Balston* v. *Bensted* (1), where there had been twenty years' enjoyment of it in a particular mode."

The principle thus asserted is directly applicable to the present case. How could the defendant's predecessor have prevented the plaintiffs' house from being built on their own land?

In *Webb* v. *Bird* (2), it was held by the Court of Common Pleas (the judgment of which Court was afterwards affirmed on appeal (3)) that an easement which was incapable of interruption was not within Lord Tenterden's Act The action was brought for

(1) 1 Camp. 463.
(2) 10 C. B. (N.S.) 268; 30 L. J. (C.P.) 284.
(3) 13 C. B. (N.S.) 841; 31 L. J. (C.P.) 335.

obstructing the passage of air to the plaintiff's windmill. That, of course, is not this case, but the grounds on which the case was held not to be within Lord Tenterden's Act are directly to the present purpose. "I do not think," says Erle, C.J., "the passage of air over the land of another was or could have been contemplated by the legislature when framing that section. They evidently intended it to apply only to the exercise of such rights upon or over the surface of the servient tenement as might be interrupted by the owner if the right was disputed. It is clear to my mind that that was the intention of the legislature, because the section provides that the claim shall not be defeated 'where there has been actual enjoyment for the period mentioned without interruption.' I am at a loss to conceive what would be an interruption of such a right as is here claimed. In the case of a way, the exercise or enjoyment of the right may be interrupted by the erection of a gate or other impediment. So of the analogous right to water. So a claim to lights may be obstructed or interrupted by the erection of a hoarding or other screen by the owner of the servient tenement." And on the appeal in the Exchequer Chamber (1), Wightman, J., in giving the judgment of the Court, says: "It has to be considered whether, independently of the statute, the right claimed may be supported upon the presumption of a grant arising from the uninterrupted enjoyment as of right for a certain term of years. We think in accordance with the judgment of the Court of Common Pleas and the judgment of the House of Lords in *Chasemore* v. *Richards* (2), that the presumption of a grant from long-continued enjoyment only arises when the person against whom the right is claimed might have interrupted or prevented the exercise of the subject of the supposed grant." After referring to what had been said by Lord Wensleydale in *Chasemore* v. *Richards* (2), the learned judge continues:—"In the present case it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject as it must be to so much variation and uncertainty, as pointed out in the judgment below, that we think it clear that no presumption of a grant or easement in the nature of a grant can

(1) 13 C. B. (N.S.) 843; 31 L. J. (C.P.) 336.

(2) 7 H. L. C. 349; 29 L. J. (Ex.) 81.

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be raised from the non-interruption of the exercise of what is called a right, by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it."

In the case of *Solomon* v. *Vintners' Company* (1) the facts were peculiar. Three contiguous houses standing on a declivity had for thirty years been out of the perpendicular, the first leaning on the second, the second on the third. The lowest house having been taken down, its removal caused injury to the highest. An action having been brought, it was held that the action would not lie, partly because, there being an intermediate house, no right of lateral support could accrue, partly because—and it is on this point that Baron Bramwell rests his judgment—as an adjacent owner can never know whether the neighbouring building requires the support of his soil, or may have sufficient support on its own foundations, the enjoyment cannot be said to be open, and therefore cannot be adverse. The Lord Chief Baron, in his judgment, casts doubts on the authority of *Stansell* v. *Jollard*, and *Hide* v. *Thornborough* (2), cases on which I have already commented.

The same question as arises in the present case, was raised before Vice-Chancellor Wood, in that of *Hunt* v. *Peake* (3), and the authorities were gone into, but it became unnecessary to decide it, as the learned Vice-Chancellor was of opinion, as matter of fact, that the land would equally have fallen had no building been erected on it.

The last authority which I shall cite, but which appears to me conclusive to show that, notwithstanding Lord Tenterden's Act, a presumption arising from user can be rebutted by shewing that no grant could ever have existed, is the case of *Mill* v. *Commissioners of the New Forest.* (4) The claimant, an allottee of waste land under an Inclosure Act, in an inquiry held under 17 & 18 Vict. c. 49, an Act for the Settlement of Claims upon and over the New Forest, claimed a right of common in the waste lands in right of such allotment, and proved an enjoyment for thirty years, exercised as of right and without interruption, which it was contended gave an absolute right under the 1st section of the Act. But it was held that the origin of the enjoyment might

(1) 4 H. & N. 585; 28 L. J. (Ex.) 370.
(2) 2 C. & K. 250.
(3) John. 705; 29 L. J. (Ch.) 785.
(4) 18 C. B. 60; 25 L. J. (C.P.) 212.

be shewn, and that as by reason of the statutes 9 & 10 Wm. 3, c. 36, and 1 Anne, c. 7, the right could have had no origin in a grant from the Crown, the claim could not be sustained. After expressing a doubt whether Lord Tenterden's Act could operate so as to repeal the Act of Wm. 3, Jervis, C.J., says: "It is, however, unnecessary to give any opinion upon that matter, because I am of opinion that assuming that Lord Tenterden's Act does apply, still the claim cannot be supported. It is not sought to be defeated or destroyed by showing *only* that the right, profit, or benefit was first taken or enjoyed at any time prior to the period of thirty years, but by showing that it never had any legal existence." And Cresswell, J., said: "I am entirely of the same opinion. It seems to be imagined by Mr. Smith that, because you cannot defeat a claim which may be lawfully made at the common law by custom, prescription, or grant, to any right of common or other profit à prendre, by showing *only* that such right or profit was first taken or enjoyed at any time prior to the period of thirty years, therefore you cannot defeat it at all. I do not find that stated in Lord Tenterden's Act. There is no attempt in this case to defeat the claim by showing only its origin, but by showing that it never could have had a legal origin." And Willes, J., said: "I am of the same opinion. What was done here was in fact this:—It was shewn that the enjoyment commenced in 1810, so that it could not give rise to the right claimed, and that it was impossible that any legal grant of the right could have existed." This case, it is true, was decided on the 1st section of the Act, but the reasoning is just as applicable to a case arising on the 2nd.

It is scarcely necessary to point out that the rule established by *Pickard* v. *Sears* (1) and *Freeman* v. *Cooke* (2) can have no application in a case where not only no assent was in fact given, but as no assent was necessary, none can be implied; in addition to which any opposition on the part of the adjoining owner would have been useless. Nor can the doctrine as to implied grants apply, as at the time of the plaintiff's factory being built the premises belonged to different and independent owners.

For the foregoing reasons I am of opinion that any presumption arising from length of enjoyment, as respects the easement of

(1) 6 A. & E. 469. (2) 2 Ex. 654; 18 L. J. (Ex.) 114.

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lateral support to houses or other buildings, is one which, both at common law and since the Act of 2 & 3 Wm. 4, s. 71, is open to be rebutted; and that if the fact that no grant was ever made is established, or from the circumstances none can be implied, the presumption fails. It is beyond all question in this case that no grant was ever made, or assent ever given. It is equally certain that there are no circumstances from which any grant, or agreement to make a grant, or assent in any form, can be implied.

I am, therefore, of opinion that judgment must be given for the defendants.

MELLOR, J. I have not thought it necessary to prepare a separate judgment, as I have had an opportunity of reading the judgment of the Lord Chief Justice and that of my Brother Lush. I admit that the case is not free from great difficulties, but I am satisfied that the conclusion at which my Lord has arrived is the only one consistent with the principles of our law and of ordinary justice, and I entirely agree with it.

The rule will be absolute to enter the verdict for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Shum, Crossman, & Crossman, for Stanton & Atkinson, Newcastle-upon-Tyne.*

Solicitors for Commissioners of Works and Public Buildings: *The Solicitors for the Treasury, Raven & Hare, Agents.*

Solicitors for the defendant Dalton: *Prior, Bigg, Church, & Adams, for T. Dalton, Leeds.*

[CROWN CASES RESERVED.]

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Jan. 19.

THE QUEEN *v.* READ.

Wild Animals, Property in—Embezzlement—Master and Servant.

A gamekeeper, not authorized to take or kill rabbits for his own use, took and killed some wild rabbits upon his master's land, and converted them dishonestly to his own use by selling them. The taking, killing, removing, and selling, were parts of one continuous action:—

Held, that a conviction of such gamekeeper for embezzlement of the rabbits could not be sustained.

CASE stated by the chairman of the Berks Quarter Sessions.

The prisoner was indicted for stealing eighteen rabbits the property of Arthur Smith his master.

The evidence shewed that the prisoner was the gamekeeper of Smith, and was employed to look after a wood in which the game and rabbits and rights of sporting had been granted to Smith by the owner. The prisoner was not at liberty to kill or take rabbits in the wood for his own use. He did take and kill and remove eighteen wild rabbits in and from the wood, and had bargained to sell them when they were seized in the possession of the purchaser's agent. The capturing, killing, removing, and selling, were parts of one continuous action.

Counsel for the defence required the Court to stop the case, because there was not any evidence to go to the jury that the rabbits had ever, as subjects of larceny, been in the possession of Smith, and therefore the prisoner could not be guilty of stealing or embezzling them.

Counsel for the prosecution insisted that when the rabbits were captured and killed by the prisoner they were, by that act, reduced into the possession of his master, and became subjects of larceny or embezzlement.

Reg. v. *Townley* (1) and *Reg.* v. *Cullum* (2) were cited.

The case was left to the jury, the Court telling them that the criminal offence of the prisoner (if any) was embezzlement, and not larceny, and that if in their opinion the prisoner being the

(1) Law Rep. 1 C. C. R. 315. (2) Law Rep. 2 C. C. R. 28.

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servant of Smith captured and killed the rabbits, although against the orders of his master, they so came into the possession of the prisoner for or on behalf of his master, and the prisoner converting them to his own use was guilty of embezzlement.

The jury found the prisoner guilty of embezzlement, and he was sentenced to four months' imprisonment with hard labour.

The question reserved was, whether the prisoner, by capturing and killing the rabbits against his master's orders, did so bring them into the possession of his master that he could by appropriating them be guilty of embezzling them.

P. Howard Smith, for the prisoner. Embezzlement is merely a species of larceny. It is a statutory crime created and defined for the purpose of meeting cases where the property stolen has never been in the actual possession of the master, except so far as the possession of the dishonest servant could be considered the possession of the master. The case of *Reg.* v. *Townley* (1) is an authority that wild rabbits are not the subject of larceny. It follows, therefore, that they are not the subject of embezzlement. Bovill, C.J., there says: "In animals feræ naturæ there is no absolute property. There is only a special or qualified right of property—a right ratione soli to take and kill them;" and then he goes on to say: "But before there can be a conviction for larceny for taking any thing not capable in its original state of being the subject of larceny, as for instance, things fixed to the soil, it is necessary that the act of taking away should not be one continuous act with the act of severance or other act by which the thing becomes a chattel." In the same case Blackburn, J., says: "Even in the case of *Blades* v. *Higgs* (2), in which it was held that game when killed becomes the property of the owner of the land upon which it was raised and killed, it was expressly pointed out that it by no means followed that an indictment for larceny would lie." In the present case, as in that, the action was continuous. In the present case it is found, and that furnishes a sufficient ground of itself for quashing the conviction, that the prisoner was not at liberty to kill or take rabbits, and consequently they were not received or taken into possession by him for or in the name of or on account

(1) Law Rep. 1 C. C. R. 315. (2) 11 H. L. C. 621; 34 L. J. (C.P.) 286.

of his master or employer; and therefore the offence of embezzlement, as defined by 24 & 25 Vict. c. 96, s. 68, has not been committed.

H. D. Greene, for the prosecution. It is not necessary for the purpose of upholding this conviction to question the decision in the case of *Reg.* v. *Townley* (1); the offence charged against the prisoner in that case could not be larceny, because there was no taking of the rabbits out of the possession of the prosecutor. In order to constitute a larceny there must be a felonious taking of a chattel out of the possession of the person in whom the property is laid in the indictment. Wild rabbits when killed are the property of the owner of the land upon which they are killed, they are when dead the subject of property unquestionably, and if so, why should they not be the subject of larceny? The true ground for the decision in *Reg.* v. *Townley* (1) is that the prosecutor there never had been in possession of the rabbits. In the present case this difficulty does not arise, since in order to constitute embezzlement it is not requisite that the master from whom the property is embezzled should have been in possession, indeed, it is that very fact, that the master has not been in possession, which marks the distinction between the crime of embezzlement and that of larceny. *Spear's Case* (2), and *Reg.* v. *Reed* (3). The cases of *Blades* v. *Higgs* (4), and the *Earl of Lonsdale* v. *Rigg* (5), are authorities in favour of the prosecution.

[HAWKINS, J., referred to *Reg.* v. *Roe.* (6)]

The case of *Blades* v. *Higgs* (4) is an authority that game when killed by a trespasser vests in the owner of the soil, that is the view expressed by Lord Westbury, and is the foundation of the decision in that case. Lord Chelmsford also says: "It is much more reasonable to hold that, the trespasser having no right at all to kill the game, he can give himself no property in it by his wrongful act; and that as game killed or reduced into possession

(1) Law Rep. 1 C. C. R. 315.

(2) 2 Leach, 825; 2 East, P. C. c. 16, s. 16, p. 568; Russ. on Crime, 5th Ed. p. 312.

(3) Dears. C. C. 168, 257; Russ. on Crimes, 5th Ed. p. 313; 6 Cox, C. C. 284; 23 L. J. (M.C.) 25.

(4) 11 H. L. C. 621; 34 L. J. (C.P.) 286.

(5) 11 Ex. 654; 26 L. J. (Ex.) 196.

(6) 11 Cox, C. C. 557; 22 L. T. (N.S.) 414, 415.

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is the subject of property, and must belong to somebody, there can be no other owner of it, under these circumstances, but the person on whose ground it is taken, or killed."

[COCKBURN, C.J. How can it be said that the prisoner received the rabbits for or in the name or on account of his master?]

Just as a dishonest collecting clerk, who collects the money meaning to misappropriate it, is said to collect for or on account of, the master, so the prisoner killed the rabbits in his master's name, acting, though acting wrongly, as his master's servant.

[COCKBURN, C.J. The words of the statute are, "whosoever being a clerk, or servant, &c., shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to, or received, or taken into possession by him, for or in the name or on the account of his master or employer, &c." It is impossible to bring the present case within those words.]

THE COURT (Cockburn, C.J., Cleasby, B., Lindley, Manisty, and Hawkins, L.JJ.). This conviction cannot be upheld.

Conviction quashed.

Solicitor for prosecution: *J. T. Dodd, Reading.*
Solicitor for prisoner: *R. A. Ward, Maidenhead.*

[IN THE COURT OF APPEAL.]

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Nov. 29.

EVERSHED *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Company — Undue Preference — Gratuitous Carting — Loading and Unloading of Customer's Goods in order to prevent Traffic from passing over other Railway—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20) *ss.* 3, 90—*Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2.

The plaintiff was a brewer carrying on business at B., where the defendants, a railway company, and the M. Company, another railway company, had stations. Three firms of brewers also carried on business at B., and their premises respectively were connected with the M. Railway. The plaintiff's were not connected with either the M. Railway or the defendants' railway. In order to prevent the traffic of the three firms from passing wholly over the M. Railway and to divert some portion of it to their own line, the defendants agreed to cart goods gratuitously between their station at B. and the premises of the three firms respectively, and they also allowed certain deductions from the rates charged to the three firms for

the carriage of their goods, the effect of which was that their goods were loaded and unloaded by the defendants gratuitously. The defendants did not cart gratuitously for the plaintiff between his premises and their station, and they did not allow to him deductions similar to those allowed to the three firms. After carting the goods for the three firms gratuitously and allowing them the deductions before-mentioned, the defendants derived a profit from the traffic, and they had not any intention to prejudice the plaintiff:—

Held, affirming the judgment of the Queen's Bench Division, that the gratuitous carting, loading and unloading of the goods for the three firms was an inequality in favour of them and an undue preference granted to them by the defendants, and was in contravention of 8 & 9 Vict. c. 20, s. 90, and 17 & 18 Vict. c. 31, s. 2, and that the plaintiff was entitled to maintain an action to recover the amounts paid by him to the defendants, which represented the cost of carting his goods between his premises and their station at B., and of loading and unloading the same.

APPEAL by the defendants against the judgment of the Queen's Bench Division.

The case is reported 2 Q. B. D. 254, where the facts are fully set out, and it will be sufficient here to make the following short statement of them.

The plaintiff was a brewer carrying on business at Burton-on-Trent, in which town the defendants and the Midland Railway Company had stations for goods. The plaintiff's premises were not connected with either railway. In the case of those brewers whose premises were not connected with either railway the defendants and the Midland Railway Company charged for the carriage of goods between Burton and any other town upon their respective lines a station-to-station rate; in addition to this rate, when they carted the goods between their respective stations and the premises of the brewers at Burton, they charged 1*s.* per ton. In the case of those brewers whose premises were connected with either railway the trucks containing goods for them did not enter the goods station, but were hauled along sidings near or into the premises of the brewers for whom they were intended; the trucks were then unloaded by the brewers at their own cost. The defendants and the Midland Railway Company were thus saved the cost of unloading the goods and of the necessary accommodation in the station, and they allowed a rebate or deduction of 9*d.* per ton from the station-to-station rate to the brewers, whose premises were connected with their respective lines. The defendants always charged the plaintiff 1*s.* per ton whenever they carted his goods for him; and never

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made him any rebate or deduction from the station-to-station rate. At Burton were three firms of brewers whose respective premises were connected with the line of the Midland Railway Company, which accordingly charged them nothing in respect of cartage, and allowed them the rebate or deduction of 9*d.* a ton. The defendants had not communication with the premises of the three firms; but when they did cartage for the latter they did not charge 1*s.* per ton or any other sum, and they also allowed to them the rebate or deduction of 9*d.* per ton, although in fact they unloaded the goods for them and afforded them the ordinary accommodation of their goods station. If the defendants had not so carted gratuitously and had not made such rebate or allowance of 9*d.* per ton, the three firms would have sent their traffic by the Midland Railway. The defendants carted gratuitously, and allowed the rebate or deduction of 9*d.* to the three firms with the view of securing a share of their traffic, which yielded a profit, after allowing the 9*d.* per ton and doing the carting gratuitously, and had no intention of prejudicing the plaintiff. If the defendants had not so carted gratuitously, and had not allowed the rebate or deduction, the plaintiff would have gained no positive advantage, inasmuch as his traffic would not have been carried at a cheaper rate, but the three firms would have lost the advantage of being able to have their traffic carried by either railway on the same terms, and the defendants would have substantially lost the traffic of the three firms.

From the year 1863 down to March, 1874, the plaintiff employed a man named Ball to settle and adjust their freightage accounts with the defendants. Ball was aware that the defendants were carrying for the three firms of brewers on the terms abovementioned, but for reasons of his own, and contrary to his duty to his employer, he concealed such knowledge from him, and the plaintiff did not get reliable information of what the defendants were doing until August or September, 1874. On the 7th of January, 1875, the plaintiff and other brewers wrote to the defendants complaining of the free cartage so done, and the rebate and allowance so made by them to the three firms of brewers, and asking for the repayment of the various amounts which they had overpaid to the defendants, and on the 30th of January following they made an application to the Railway Commissioners under the

Regulation of Railways Act, 1873, in which they complained that the defendants carried for the three firms upon the terms above stated, and asked for an order that the defendants should desist from such practice, which they alleged to be an undue preference. On the 10th of March, 1875, the Railway Commissioners granted the injunction applied for. Thereupon the defendants ceased on the 31st of March, 1875, to cart gratuitously for and to make the above-mentioned rebate or allowance to the three firms, and the consequence was that they lost substantially the whole of the traffic of the three firms. The question for the opinion of the Court was, whether the plaintiff was entitled to recover the whole or any part of the sum of 1s. 9*d.* per ton upon goods carried by the defendants for him under the circumstances described, and upon which he had paid cartage during six years before the commencement of this action.

The Court was to have power to draw inferences of facts.

The Queen's Bench Division held (1) that the plaintiff could not recover in respect of the payments made whilst Ball was in his service, and in respect of those made between September, 1874, and the 7th of January, 1875, for during the former period Ball was the plaintiff's agent to settle accounts with the defendants who were guilty of no fraud, and during the latter period the payments made by the plaintiff must be deemed voluntary; but the Queen's Bench Division held that he was entitled to recover in respect of the payments made between the time when Ball quitted his service and September, 1874, and in respect of those made between the 7th of January, 1874, and the date of the writ; for during the former period the plaintiff was ignorant of the facts, and during the latter he paid under compulsion.

Nov. 28, 29. *J. W. Mellor, Q.C.*, and *J. S. Dugdale*, for the defendants. The present action cannot be maintained, for the plaintiff claims to be put upon the same footing with the three firms, although they have certain advantages of situation over him. Suppose that their breweries had been built upon the banks of a navigable river: this would be a natural advantage of which they could not be deprived, and which would enable them to obtain

(1) 2 Q. B. D. 263, 268.

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better terms for sending their traffic over the defendants' railway than the plaintiff could do: *Re Ransome and Eastern Counties Ry. Co.* (1). The same principle applies here. It is lawful for a railway or canal company to agree to carry the traffic of large traders at a lower rate than that of small traders: *Re Nicholson and Great Western Ry. Co.* (2); *Strick* v. *Swansea Canal Co.* (3); and yet the latter are more injured by an agreement of that kind than the plaintiff in the present case is by the agreement between the defendants and the three firms. There is no inequality within the meaning of the Railways Clauses Consolidation Act, 1845, s. 90, and no undue preference contrary to the provisions of the Railway and Canal Traffic Act, 1854, s. 2. (4) There may be a difference in principle between the charge of 1*s.* for cartage, and the rebate or allowance of 9*d.*; for the former cannot in any view be a "toll" as interpreted by the Railways Clauses Consolidation Act, 1854, s. 3, as it relates to something which is not done upon the railway. The preference shewn to the three brewers is not undue with regard to them: they only reap the benefit of their proximity to the Midland Railway, and it is this advantage of locality which distinguishes the present case from *Re Harris and Cockermouth and Workington Ry. Co.* (5) The charges made by the defendants to the plaintiff were in themselves reasonable, and therefore it is clear he cannot rely upon the common law, for according to it the charges of a common carrier need not be uniform, although they must be reasonable: per Blackburn, J., *Great Western Ry. Co.* v. *Sutton* (6); and the statutes above-mentioned do not prevent this rule from applying to the present case. The defendants have acted bonâ fide; they have had no wish either to favour the three firms or to prejudice the plaintiff: they only desired to increase their traffic. The defendants also rely upon the 63rd section of the statute incorporating them (9 & 10 Vict.

(1) 4 C. B. (N.S.) 135; 27 L. J. (C.P.) 166.

(2) 5 C. B. (N.S.) 366; 28 L. J. (C.P.) 89.

(3) 16 C. B. (N.S.) 245; 33 L. J. (C.P.) 240.

(4) The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 3, 90, and the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2, will be found set out in a note to the report of the proceedings before the Queen's Bench Division (2 Q. B. D. 254, at p. 261.)

(5) 3 C. B. (N.S.) 693; 27 L. J. (C.P.) 162.

(6) Law Rep. 4 H. L. 226, at p. 237.

c. cciv.), which in effect empowers them to charge "a reasonable sum for loading, covering, and unloading of goods, and for delivery and collection." (1)

The defendants also contend that even if a breach of either or both of the statutes above-mentioned has been committed, no action will lie at the suit of the plaintiff, because he has not sustained any damage. The alleged breach of the statutes relied on consists in performing services for the three firms without remuneration; but if they had been charged at the same rate as the plaintiff, he would have gained nothing. The Railway Commissioners may grant an injunction, but no action is maintainable: *Hozier* v. *Caledonian Ry. Co.* (2)

The Queen's Bench Division have held the defendants liable for two out of four periods to which the present action relates, namely, the period between the last settlement of accounts by Ball and September, 1874, and the period between the 7th of January, 1875, and the commencement of the action. It may be admitted that if the action is maintainable at all, the plaintiff is entitled to recover in respect of the former of these two periods, on the ground that he paid the sums charged by the defendants in ignorance of their terms of dealing with the three firms: but as regards the latter period, the case does not clearly state that the plaintiff, who then was well aware of all the facts, protested against the charges made by the defendants, and a protest at time of payment is necessary to enable him to recover back whatever he paid with knowledge of the facts. (3)

(1) By 9 & 10 Vict. c. cciv., s. 2, the Railways Clauses Consolidation Act, 1845, is made to apply to the defendants' company.

By s. 3 the defendants are constituted a body corporate.

By s. 63 it is, amongst other things, provided as follows: "And with respect to the conveyance of goods, the maximum rates of charges to be made by the company for the conveyance thereof along the railway, including the tolls for the use of the railway, and waggons or trucks and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading of goods, and for delivery and collection, and any other services incidental to the business or duty of a carrier, where such services or any of them are or is performed by the company, shall not exceed the following sums." The section then contains a table of charges for the conveyance of goods.

(2) 17 Sc. Dec. 2nd Ser. 302.

(3) *Mellor, Q.C.*, stated to the Court that he did not now rely upon the argument advanced before the Queen's Bench Division (2 Q. B. D. pp. 264 and 267)

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Alfred Wills, Q.C., and *C. Gould*, for the plaintiff. In any point of view the rebate or allowance of 9*d.* was a contravention of the Railways Clauses Consolidation Act, 1845, s. 90; for it was made in respect of the conveyance upon the defendants' railway of goods belonging to the three firms. Then the abatement of 1*s.* made to them does not apply simply to the cartage in Burton; for it is a deduction from the whole rate: its effect as regards the plaintiff is to increase indirectly and improperly the station-to-station rate. The collection of goods is part of a carrier's business, and therefore the remuneration paid for it to the defendants by the plaintiff must be a "toll:" and further, if the cartage be not a "toll," the defendants are acting ultrà vires and illegally in taking it. Inequality of charge always creates undue preference, except where a particular circumstance renders certain traffic cheaper. It is unlawful for a railway company to lower their rates in order to give a preference to any particular traffic: *In re Oxlade* (1); nor can they regulate their rates with a view to their own interests, if they thereby inflict a disadvantage upon any of the public: *In re Baxendale* v. *Great Western Ry. Co.* (2)

It is clear that a railway company is liable to repay the charges which they have improperly made: *Great Western Ry. Co.* v. *Sutton* (3); and as the defendants have illegally exacted sums of money from the plaintiff, he is at liberty to reopen the accounts settled by Ball, and to recover even voluntary payments.

Mellor, Q.C., in reply. No case has been decided with facts exactly like those stated in this special case, and therefore this Court may found its judgment upon general principles, and is not fettered by the decisions of inferior tribunals.

BRAMWELL, L.J. I am of opinion that the judgment of the Queen's Bench Division should be affirmed. The principles upon

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that the principle of the Railways Clauses Consolidation Act, 1845, s. 90, only applies to tolls for the use on the railway of carriages not belonging to the railway company: see *North British Ry. Co.* v. *Carter* (8 Sc. Dec. (3rd Series), 998); *Caledonian Ry. Co.* v. *Guild* (1 Sc. Dec. (4th Series), 198); *Peebles* v. *Caledonian Ry. Co.* (2 Sc. Dec. (4th Series), 346).

(1) 1 C. B. (N.S.) 454; sub nom. *In re Oxlade* v. *North Eastern Ry. Co.*; 26 L. J. (C.P.) 129.

(2) 5 C. B. (N.S.) 336; 28 L. J. (C.P.) 81.

(3) Law Rep. 4 H. L. 226.

which our decision turns seem to us very clear, and therefore although the question before us is of importance, and although we desire to state our reasons with accuracy, so that they may be a guide in future cases of a like kind, we will proceed to deliver judgment at once.

I do not think that if the goods of the three firms were in point of substance carted gratuitously by the defendants, the sum of 1*s.* charged to the plaintiff for cartage would fall within the word "toll," as defined in s. 3 and as used in s. 90 of the Railways Clauses Consolidation Act, 1845; to my mind that word does not include a charge for cartage or collection; it only includes charges for receiving upon, transit along, and delivery from the railway of the goods intrusted to the company. I am further of opinion that the 63rd section of the statute incorporating the defendants (9 & 10 Vict. c. cciv.) does not make the charge of 1*s.* a "toll," within the meaning of the Railways Clauses Consolidation Act, 1845. That section forbids the defendants to charge for the conveyance of goods more than certain rates, "including the tolls for the use of the railway, and waggons or trucks and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading of goods, and for delivery and collection, and any other services incidental to the business or duty of a carrier." I do not think that the exception in this clause enables the company to make a charge for cartage, if they are not otherwise empowered so to do; it is merely inserted ex abundanti cautelâ. It has been argued that the collection of the goods is part of the defendants' business as carriers, and therefore that the remuneration for it must be a "toll;" and a further objection has been suggested that if it is not a toll, it is ultrà vires, and therefore illegal in the defendants to take it. I think it is not ultrà vires, it is incidental to a business they may carry on. On this doctrine, first introduced in the common law courts in *East Anglian Ry. Co.* v. *Eastern Counties Ry. Co.* (1), Brice on Ultrà Vires, p. 434 (2nd ed.), may be read with advantage. But whether ultrà vires or not, I think it beyond doubt that the charge for collection is not a "toll" within the Railways Clauses Consolidation Act, 1845, s. 90.

(1) 11 C. B. 775.

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On the other hand, I am clearly of opinion that the sum of money charged to the three firms does include a charge for collecting, and loading, and unloading their goods. It is stated in the case that the defendants did the cartage for the three firms gratuitously; but we are empowered to draw inferences of fact, and I come to the conclusion that this statement is not strictly accurate. If the defendants had *intended* to prejudice the plaintiff by an unequal rate, they could not effect that object by making no charge to the three firms for a portion of the services rendered. The Railways Clauses Consolidation Act, 1845, s. 90, enacts that no reduction or advance "shall be made either directly or indirectly in favour of or against any particular company or person." The word "indirectly" may not of itself have much force, but it helps to shew the intention of the legislature; and the legal maxim, dolus circuitu non purgatur, is in point. I have no doubt that the defendants intended to act bonâ fide, but I am satisfied that the charge made to the three firms for carrying their goods did include a charge for the cartage. Let me apply the following test: suppose that the defendants' servants whilst employed in carting goods for one of the three firms lose or injure them, can it be doubted that the defendants will be liable as common carriers? and yet common carriers do not act gratuitously. In reality the defendants receive from the three firms one sum, which includes payment for carriage upon the railway, and also payment for cartage. It is perfectly clear that the rebate or allowance of 9*d.* is a deduction from the "toll," as that word is interpreted in the Railways Clauses Consolidation Act, 1845, s. 3, and therefore as to it the question does not really arise which I have just disposed of, as to the charge of 1*s.* Therefore, as the total charge made by the defendants to the three firms for carrying their goods includes payment for the cartage, and as the sum of 9*d.* is likewise deducted therefrom, it is plain that the defendants charge the three firms less for "tolls," that is, for conveying their goods on the railway, than they receive from the plaintiff for the same service. This amounts to a contravention of the 90th section of the Railways Clauses Consolidation Act, 1845, and the action is maintainable for breach of that section alone.

But, further, I am in favour of the plaintiff also as to the con-

truction of s. 2 of the Railway and Canal Traffic Act, 1854. Undoubtedly it seems a little hard at first sight that by deciding n favour of the plaintiff the defendants will probably lose the whole traffic of the three firms; but after further consideration it will be found that the hardship is scarcely real, for the defendants an keep a share in the traffic of the three firms provided they arry the plaintiff's goods at the same rate as those of the three rms.

Cases were cited to shew that a benefit may be given to one erson which another has not in his dealings with a railway. That is true, but the principle of those cases does not apply. I m not going to attempt to lay down a precise rule, but, speaking enerally and subject to qualification, it is open to a railway company to make a bargain with a person, provided they are willing o make the same bargain with any other, though that other may ot be in a situation to make it. An obvious illustration may be ound in season tickets; a man is taken a daily journey for a 1*s.*, or which his neighbour who takes it once a month pays 5*s.* He s entitled to the same benefit, but it is one of which he cannot vail himself. So as to goods. If a million tons are carried for . at a certain rate, B. may demand the same rate for the same uantity though he never will nor can, because his dealings are oo small. It is reasonable this should be so; a large business an be done at a cheaper rate than small; nothing like that exists ere. It was also urged that the three firms had something in ne nature of a natural advantage to the benefit of which they ere entitled in their dealing with the defendants. I am of pinion that is not so. They have indeed an advantage which nables them to put a pressure on the defendants, but if the dendants yield to it they must give an equal advantage to the laintiff. If the three firms were a mile nearer than the plainff to the defendants' station, doubtless the defendants might harge the plaintiff a larger sum for carriage. But the only dvantage here that the three firms have, is that they have easy ccess to another railway. So they might have to a canal, or rdinary highway. But these considerations though a reason for e diminished charge do not justify the extra charge to the aintiff.

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I feel sure that our decision carries into effect the intention of the legislature. It was manifest that railway companies would enjoy almost a monopoly of traffic, and it was thought right that all persons dealing with them should be put upon an equality. The plaintiff, therefore, has a right to complain that the goods of the three firms should be carried at a charge of 1*s.* 9*d.* less per ton than his. I think that in the words of the Railway and Canal Traffic Act, 1854, the defendants made and gave an "undue and unreasonable prejudice and advantage to and in favour of" the three firms, and subjected the plaintiff to an "undue and unreasonable prejudice and disadvantage." The language of this statute is relative, and although the charges made to the plaintiff may not in themselves be wrong, yet they become unlawful by reason of the lower charges made to the three firms; therefore the plaintiff is entitled to recover under either of the statutes upon which he relies.

I wish to say a few words as to the damages. Under the Railways Clauses Consolidation Act, 1845, s. 90, the plaintiff is entitled to recover the wrongful charge of 1*s.* 9*d.* a ton as money received to his use. Under the Railway and Canal Traffic Act, 1854, s. 2, the same conclusion is arrived at, although possibly by different means. If the plaintiff is to be considered as having suffered a tort at the hands of the defendants, the measure of damages will be the difference between the amount that he has actually paid and the amount which he ought to have paid: if he is to be deemed to have paid the sum of 1*s.* 9*d.* per ton without consideration, he is entitled to sue for money received for his use. In every point of view the result is the same.

The Queen's Bench Division have divided into four periods the time to which this action relates and have held that the plaintiff is entitled to recover as to two of those periods, and is not entitled to recover as to the other two. (1) I think that in this respect also the decision of the Queen's Bench Division is perfectly correct, and I agree with the reasons which they have assigned.

BRETT, L.J. I am of opinion that the judgment of the Queen's Bench Division should be affirmed in every respect.

(1) 2 Q. B. D. 263, 268.

In my opinion the question to be decided depends solely upon the nature of the transactions between the plaintiff and the defendants, and the only circumstances at which we are entitled to look are those arising between them. Great stress has been laid upon the relations of certain firms of brewers with the Midland Railway Company, and the existence of those relations may have given rise to the motives which induced the defendants to act with regard to those firms in the manner described in the case. But the motives of the defendants seem to me to be immaterial. The question is whether they made any distinction between the plaintiff and any other persons, who were under the same circumstances as he was with regard to themselves. Now it seems to me that the plaintiff and the three firms of brewers in their relations with the defendants were under the same circumstances in every material respect. The defendants did the same things for both the plaintiff and the three firms of brewers: in each case they collected and carted the beer through the town, they took it to their station, they then put the beer into similar trains and conveyed it over the same lines of rails, and, as may be assumed for the purposes of this discussion, the quantity carried for the plaintiff and the three firms was the same. Between what the defendants did for the plaintiff and what they did for the three firms, no difference exists; but the charges which the defendants made to the plaintiff and the charges which they made to the three firms in respect of the same services were different. In my opinion, by adopting this course the defendants have committed a breach of both the Railways Clauses Consolidation Act, 1845, s. 90, and the Railway and Canal Traffic Act, 1854, s. 2, and upon the facts before us the plaintiff can maintain an action to recover certain sums which the defendants have received in contravention of those statutes.

During the argument before us a distinction has been attempted to be drawn between the sum of 1*s.* and the sum of 9*d.*; it is unfortunate that this distinction was not suggested during the hearing in the Queen's Bench Division, and that, therefore, we are without the benefit of the opinion of the judges of that division as to this contention.

I cannot bring myself to doubt that the sum of 9*d.*, which was

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allowed by the defendants to the three firms, was part of the toll which they were entitled to charge, and to be paid by the three firms for the conveyance of their goods upon the railway. The defendants were entitled to charge and to be paid by the plaintiff the same amount of toll; but they allowed no part of it as a rebate to the plaintiff. Therefore, in respect of that 9*d.* it seems to me that there was a manifest inequality.

With regard to the 1*s.*, I confess myself to be under considerable doubt whether that also is not to be considered as part of the "toll" paid to the defendants, within the meaning of the Railways Clauses Consolidation Act, 1845, s. 3. A railway company undertake to do more than merely carry the goods intrusted to them; it is impossible that this should be the only duty which is imposed upon them. As a necessary incident of carrying the goods they must both receive and deliver the goods; they may or may not receive the goods at the very edge of the rails, but, as it seems to me, from the time when they take the goods into their possession for the purposes of conveyance, they are carriers of the goods, they are entitled to charge and do charge in respect of the conveyance of the goods from that moment and thenceforward until the goods are delivered at their destination. Sometimes the company do not receive the goods at the edge of the rails, but at station houses belonging to them; sometimes they take in the goods at receiving houses, or, as appears to be done at Burton, the companies collect them at the very place of business of their owner. In my view, wheresoever the goods may be received, from the moment when they are received the company are liable as common carriers, and have the rights of common carriers; and I think that they can be considered common carriers only because they are then conveying the goods. If the collecting were not part of the receiving for conveyance, possibly the company would be carrying on a business without authority, unless 9 & 10 Vict. c. cciv. empowers them so to do. But I cannot doubt that they are empowered to carry it on, and I apprehend that they might carry it on although they are not authorized to do so by that Act; because the receiving is a necessary incident, and therefore a part of the carrying, and nothing prevents the company from receiving at one place rather than another, and collecting is only one mode

of receiving, and the company are entitled to charge for the conveyance of the goods. It is true that the 1s. is not charged as part of the toll; but, for the reasons which I have given, I have a strong impression that it is part of the charge for conveyance, and, as I have before said, I very much doubt whether it is not a "toll" within the Railways Clauses Consolidation Act, 1845, s. 3. I should have thought this conclusion tolerably clear if it were not for what has fallen from Lord Justice Bramwell. If the charge cannot be strictly called a toll, I think it is a charge for a service which is a necessary incident towards earning the toll, and if the defendants exact payment of it from one person, and not from others, they are at least indirectly favouring the persons from whom they do not exact it, and, therefore, do that which falls within the prohibition of the Railways Clauses Consolidation Act, 1845, s. 90.

Whatever may be the true construction of that statute, I cannot doubt the defendants have committed a breach of the Railway and Canal Traffic Act, 1854. They have received, and collected, and conveyed the beer of the plaintiff, and also of the three firms, rendering to them exactly similar services, but charging a higher rate to the plaintiff, and a lower rate to the three firms. This is a preference within that statute, and an undue preference.

The plaintiff has been subjected to overcharges. Some of those overcharges he has paid without knowledge of the terms of dealing between the defendants and the three firms: these he can recover back as money paid, which he was not bound to pay either by law or by contract. Others of the overcharges he has paid with knowledge, but after a sufficient protest: these likewise he can recover back, because although at the time of payment he had knowledge, a compulsion was put upon him. These are the reasons given by the Queen's Bench Division, and I think them right. But others of the overcharges were paid upon settlements of accounts which were made by the plaintiff or his agent after the goods were carried, and when no compulsion could be put upon him, and which were settled by him or his agent with knowledge of the facts. It seems to me to be in accordance with the general law to hold that a settlement of accounts made under such circumstances

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as these is final, and that no part of the money then paid can be recovered back.

I am therefore of opinion that the judgment of the Queen's Bench Division was right in every respect, and I have only to add that our judgment is entirely in accordance with the authorities cited during the argument.

COTTON, L.J. I am of the same opinion. The first question is whether an unequal charge has been made against the plaintiff contrary to the prohibition of the Railways Clauses Consolidation Act, 1845, s. 90. Now the beer of the plaintiff was carried over the same portion of the defendants' railway under the same circumstances as the beer of the three firms. On looking at the construction of this section, it seems plain that the only circumstance to be looked at is as to whether any material difference exists between the terms upon which the goods of various owners are carried. In order to render lawful an inequality of charge the goods must be carried under different circumstances, and goods are carried under the same circumstances when the cost to the railway company of carrying them is the same. In the present case it is unnecessary to say whether the sums of 1*s.* and 9*d.* are "tolls," but here they represent what may be considered a bonus given to the three firms of brewers for allowing the defendants to carry their beer, and therefore these sums constitute a deduction from what the three firms pay for the conveyance of their goods from station to station. It has been argued before us that, according to he principle of several decisions, the sender of goods by a railway company is not to be deprived of the benefits which he may enjoy, and that the three firms of brewers have a natural advantage of which they are entitled to the full benefit. The effect of these decisions has been misunderstood: they may shew that the senders of goods are not to be deprived of any advantage which they may have for using the railway; but here the three brewers have no natural advantage for sending their goods over the defendants' railway, although they enjoy facilities for transmitting their goods along the Midland Railway: as regards the defendants the three firms have simply facilities for making a good bargain, and they have not a natural facility for sending their goods over

the defendants' railways in the sense, in which that expression is used in the cases relied upon during the argument. Therefore I am of opinion that the defendants have been doing that which is forbidden by the Railways Clauses Consolidation Act, 1845, s. 90.

Then, as to the question arising upon the construction of the Railway and Canal Traffic Act, s. 2, in my opinion there is an undue preference as regards the three firms, and an undue disadvantage as regards the plaintiff and those who are in a similar position with him. The defendants are bound to afford all reasonable facilities for receiving, forwarding, and delivering the traffic upon and from their railway, and they are bound to shew no undue preference. The defendants are not bound to have receiving houses in the town of Burton, or to send round their carts to collect goods for transmission; but this in point of fact they do; and they do what is within the prohibition of the Railway and Canal Traffic Act, 1854, s. 2, if they shew any preference towards some of their customers and impose any undue disadvantage upon others. It seems to me that here an undue preference clearly exists, because the defendants collect the beer of both the three firms and the plaintiff, and perform the same services for both: yet they make no charge for cartage to the three firms, and oblige the plaintiff to pay for it; and they make a rebate of 9*d.* to the three firms, and make no allowance to the plaintiff. I think this an undue preference. I take it that when a railway company receive goods to be carried over the same line under circumstances involving the same cost and the same risk to themselves, and in respect to these goods render the same services, there is an undue preference if a higher charge is made to some customers than to others. Those decisions stand upon a different footing, in which it has been held lawful for a railway company to allow a deduction to customers who have entered into an engagement to send a large quantity, or to send constantly consignments of goods; and the reason of those decisions is that the company can carry at less cost to themselves large quantities of goods sent in regular consignments than small parcels sent at irregular intervals.

Therefore, under whichever statute we view the proceedings of the defendants, it is plain that they have done that which they

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are not entitled to do. The sums which the plaintiff has paid in excess of the sums paid by the three firms are overcharges; and those which he has paid, either in ignorance of the facts or under protest, he is entitled to recover back.

Judgment affirmed.

Solicitors for plaintiff: *Dobinson, Geare, & Son.*
Solicitor for defendants: *R. F. Roberts.*

Dec. 7.

[IN THE COURT OF APPEAL.]

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False Representation—Contagious Disease, Animals affected with—Sale in Market—Implied Representation that Animals not suffering from Disease—Conditions of Sale—Contagious Diseases (Animals) Act, 1869 (32 & 33 *Vict. c.* 70) *s.* 57—*Vendor and Purchaser.*

The defendant sent for sale to a public market pigs which he knew to be infected with a contagious disease; they were exposed for sale subject to a condition that no warranty would be given and no compensation would be made in respect of any fault. No verbal representation was made by or on behalf of the defendant as to the condition of the pigs. The plaintiff having bought the pigs, put them with other pigs, which became infected; some of the pigs bought from the defendant and also some of those with which they were put died of the contagious disease. The plaintiff having sued to recover damages for the loss which he had sustained:—

Held, reversing the judgment of the Queen's Bench Division, that, although the defendant might have been guilty of an offence against the Contagious Diseases (Animals) Act, 1869, he was not liable to the plaintiff, for that his conduct in exposing the pigs for sale in the market did not amount to a representation that they were free from disease.

Aff'd 6 H. of L. 4 App. Cas. 13.

APPEAL from the judgment of the Queen's Bench Division in favour of the plaintiff. (1)

The statement of claim, amongst other things, alleged that the plaintiff was a farmer and the defendant a cattle dealer, and that by warranting certain pigs to be free from any infectious disease, the defendant sold thirty-two of such pigs to the plaintiff for 44*l.*; and that even if the defendant did not warrant the pigs, the defendant either knowingly, or having good reason for believing

(1) 2 Q. B. D. 331.

that the pigs were suffering from an infectious disease, exposed the same for sale at a public market, and sold thirty-two of the same to the plaintiff; and that the defendant knew that the plaintiff was a farmer, and that the pigs would be placed with other pigs, and would also be turned into stubble fields, and that though the plaintiff was not aware of the fact, and bought them as sound, the pigs at the time of the sale to the plaintiff were suffering from a certain infectious disease, and thirty of them died therefrom. That the pigs were placed with other healthy pigs and infected the same, and that the pigs were turned out into certain stubble fields, and infected the fields.

The statement of defence traversed all the allegations of the statement of claim.

At the trial before Brett, J., at the Berkshire summer assizes, 1876, the following facts were proved. The defendant being possessed of a herd of pigs, many of which were dying of typhoid fever—a disease very infectious and fatal to animal life—sent the remainder of the herd to the Newbury cattle market to be sold by auction. Of these pigs the plaintiff bought thirty-two. They had been examined by the government inspector before they were admitted into the market, and at the time of sale shewed no outward symptoms of disease. The sale took place, amongst others, on the following condition: "That no warranty will be given by the auctioneer with any lot, and as all lots are open for inspection previous to the contract of sale, no compensation shall be made in respect of any fault or error of description of any lot in the catalogue." After the sale the pigs were taken to the plaintiff's farm, where thirty out of the thirty-two pigs died of typhoid fever, and the diseased pigs infected other pigs of the plaintiff on the farm, many of which also died.

On these facts the learned judge left the following questions to the jury. 1. Did the pigs die of a contagious fever? 2. Had they a contagious disease when sold? 3. Did other pigs of the plaintiff catch the disease from the pigs the plaintiff bought? 4. Did the defendant know that the pigs had a disease dangerous to them, and were worthless when he sold them? The jury having answered these questions in the affirmative, a verdict was thereupon entered for the plaintiff for 66*l.*, with leave to the

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defendant to move to enter a nonsuit, on the ground that there was no evidence that the defendant at the time of the sale of the pigs (the subject-matter of the action) had warranted the pigs, or had been guilty of any fraud in relation thereto, or was aware that the pigs were infected as alleged.

Nov. 30. *Powell, Q.C.*, and *H. D. Greene*, for the defendant. The question is whether the defendant by exposing pigs for sale in a public market impliedly represents that the pigs have no infectious disease. (1) The plaintiff cannot rest his case on a warranty, for there is no evidence of any warranty: neither is this an action for deceit, for the statement of claim does not contain any allegation of fraud. The action appears to be brought for the violation of the provisions of 32 & 33 Vict. c. 78, s. 57. It is said inasmuch as the statute prohibits the exposure of cattle suffering from disease in a public market, the defendant by exposing his pigs for sale impliedly represents that they have no infectious disease. The action being in the nature of a false representation, the plaintiff must establish that there was, in point of fact, some representation intended to be acted on, and false to the knowledge of the person making it, and that the damage was the result of the representation. It is quite clear that there was no representation by words: the plaintiff's case must be that there was a representation by conduct. But there was no evidence of any representation. And it is doubtful whether a representation by conduct alone is sufficient to support an indictment for obtaining money by false pretences. *Rex* v. *Barnard* (2) is usually cited as an authority establishing a contrary rule; but when the facts are looked at it will be found that the prisoner did make a false representation by words, for he stated that he belonged to Magdalen College. A dealer by exposing pigs for sale in a market does not represent that they are free from disease. Possibly an inference may be drawn from such an act that the owner did not know that they were diseased, because it may be inferred from the ordinary con-

(1) The defendant's counsel also contended that in fact there was no evidence that the defendant knew that the pigs were infected with a contagious disease, but as to this point the Court intimated that they were satisfied there was such evidence.

(2) 7 C. & P. 784.

duct of a man that he is not then committing a crime, but he does not thereby represent that he is innocent of a breach of the law. But an inference drawn by a man's conduct is something very different from a representation conveyed by words. A man may not act with a view that a false conclusion may be drawn from his conduct; if he acts in such a way that a false conclusion may be drawn, but he does not intend that it shall be drawn, he is not to be held liable if another person draws that conclusion, acts upon it and thereby suffers injury.

There is no authority for the proposition that an indictable offence is committed by bringing into a market animals in a known state of disease, which endangers the health of other animals in the market if they are such as are destined for human food. *Rex* v. *Vantandillo* (1) is an authority for saying that exposing a person having a contagious disorder publicly to the endangering the health and lives of the rest of the Queen's subjects is indictable, and *Rex* v. *Burnett* (2) is to the same effect, and so exposing a glandered horse in a public place is indictable: *Reg.* v. *Henson* (3); but the gist of the offence in all these cases is the danger that the disease may be communicated to persons. There can be no nocumentum unless there is danger to persons; injury to property is not sufficient. The analogy drawn in the judgment of the Queen's Bench Division between acts causing danger to the health of the Queen's subjects, and exposing animals known to be diseased is fallacious, and therefore the ground of the judgment cannot be supported.

Matthews, Q.C., and *Bros*, for the plaintiff. The defendant was aware that his pigs were infected with a contagious disease, and yet he sold them to the plaintiff, and thereby allowed them to come into contact with other pigs, to which the disease was communicated; this alone renders the present action maintainable, for the liability of the owner of an animal infected with a contagious disease is the same as that of the owner of a mischievous animal: this is plain from the remarks of Bramwell, B., in *Cooke* v. *Waring* (4); in either case the owner, knowing of the defect,

(1) 4 M. & S. 73.
(2) 4 M. & S. 272.
(3) 1 Dear. C. C. 24.
(4) 2 H. & C. 332, at p. 335; 32 L. J. (Ex.) 262, at p. 263.

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must prevent the animal from doing injury to other persons. Moreover, it has been decided that the seller of a diseased animal is liable to compensate the buyer if it communicates the disease to other animals belonging to him: *Smith* v. *Green*. (1)

[BRETT, L.J. In that case the plaintiff sued for breach of warranty, and the question raised was whether the damages were not too remote.]

The main question is, did the defendant by his conduct represent that he did not know that the pigs had a contagious disease. From the defendant sending the pigs to market, it is reasonable to draw the inference that the pigs are his, that he has a right to sell them; and further it may be inferred that he would not send diseased pigs to market for sale, for the statute 32 & 33 Vict. c. 70, forbids his doing so, therefore the defendant by his conduct represents that the pigs so far as he knew were not diseased. A representation may be made by conduct as well as by words. In *Eichholz* v. *Bannister* (2) it was held that the vendor of a chattel by his conduct gives the purchaser to understand that he is the owner, or in other words he affirms that he is the owner of the chattel. It is the legitimate conclusion to draw from the act of dominion the owner exercises. The acts and conduct of the prisoner without any representation have been held to be sufficient to support an indictment for false pretences: *Rex* v. *Barnard* (3); *Rex* v. *Coulson*. (4) By analogy to the criminal law, it is legitimate to draw inference of a representation from conduct only. In *Bodger* v. *Nicholls* (5), Blackburn, J., expressed an opinion that the defendant by sending a diseased cow to a public market to be sold, although he gave no warranty, furnished evidence of a representation that so far as he knew the cow was not diseased. The presumption to be drawn from a man's conduct is that he is acting innocently; and where a dealer offers animals for sale at a public market, and the statute prohibits him from sending diseased animals there, those attending the markets are justified in assuming that he is guilty of no offence. But even if the defendant makes no representation by words, he is nevertheless liable, because by

(1) 1 C. P. D. 92.
(2) 17 C. B. (N.S.) 708; 34 L. J. (C.P.) 105.
(3) 7 C. & P. 784.
(4) 1 Den. C. C. 592.
(5) 28 L. T. 441.

his conduct the plaintiff was reasonably induced to believe that the defendant represented that the pigs were free from disease, and whether the defendant's conduct amounts to fraud or not he remains liable to compensate the plaintiff. The Queen's Bench Division were right in holding the plaintiff liable in the action.

[BRETT, L.J. In *Bagleole* v. *Walters* (1) the defendant offered a ship for sale which he knew had a latent defect, but he did nothing to conceal the defect. Lord Ellenborough held that the purchaser could not repudiate the sale. (2)]

That case may be distinguished from the present, on the ground that here the vendor is prohibited by statute from sending diseased pigs to a public market, in that case the vendor was under no statutory obligation. In the present case the whole conduct of the defendant is evidence of representation which ought to have been left to the jury.

Greene, in reply. There was no duty on the defendant to disclose the real condition of the pigs. To send diseased cattle to market is not indictable or actionable unless it is an offence created by some statute: *Hill* v. *Balls*. (3)

Cur. adv. vult.

Dec. 7. The following judgments were delivered:—

BRAMWELL, L.J. In this case I cannot say that my mind is free from doubt. The facts are stated with admirable clearness by my Brother Lush in his judgment in the Court below. The plaintiff bought a certain number of pigs at a public market at auction under certain conditions of sale, which stated that "no warranty will be given by the auctioneer with any lot, and as all lots are open for inspection previous to the commencement of the sale, no compensation shall be made in respect of any fault or error of description of any lot in the catalogue." The plaintiff, however, asserts that he was induced to enter into that contract by fraudulent representation on the part of the defendant, which led him to understand that the pigs were not infected by a contagious

(1) 3 Camp. 154.

(2) As to the law in relation to concealment of defects by the vendor, see the judgment of Cockburn, C.J., in *Smith* v. *Hughes*, Law Rep. 6 Q. B. 597.

(3) 2 H. & N. 299; 27 L. J. (Ex.) 45.

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disease to the defendant's knowledge, but this they were, and the consequence was that the pigs were of much less value than they would otherwise have been, and also that they infected other pigs belonging to the plaintiff.

Now, I think I may assume that the defendant knew that the pigs were infected with a contagious disease; then if so, the only remaining question would be whether the defendant, knowing that to be the case, fraudulently represented the contrary, with a view to defraud the plaintiff, and whether the plaintiff was defrauded and deceived thereby.

The only evidence by which it was sought to make out that the defendant fraudulently represented that the pigs were to his knowledge free from disease, was that he exposed them for sale in a public market. It is unlawful to expose pigs infected with a contagious disease in a public market, and the defendant must be taken to have known that: and from this it was argued that, by the very fact of exposing pigs in a public market, the defendant must be taken to affirm that to his knowledge they were not infected with any contagious disease. But when to that argument it is objected that the defendant affirmed nothing, the line of argument is altered, though not substantially, and it is said that the defendant's conduct was such as would reasonably cause any person to believe that he represented that he did not know that the pigs were infected with a contagious disease. Then, when it is objected to that mode of putting the case, that the action could only be maintained on the ground of fraud, it is answered, it matters very little what the defendant's intention was, if he knew that his conduct would deceive other people, and that they would think that he was by his conduct asserting in effect that these pigs were not infected with a contagious disease; that is fraud on his part, because the defendant must expect that people will draw a natural and proper conclusion from his acts; and therefore, as it was put in the argument, there was evidence to be left to the jury from which they might find that the defendant had made a fraudulent representation. The argument appears to me to be this: there is evidence that the defendant knew that the pigs were infected with disease; there is evidence that he knew that in that case he ought not to bring them into a public market;

then it is said that there is evidence that the defendant must have known that persons might infer that he was not knowingly committing an illegality, and consequently there is evidence to shew that his conduct was likely to deceive persons into the belief that to his knowledge these pigs were not infected with disease. Mr. Matthews limits his argument to the case of cattle being sent to a public market, but if the argument is well founded, the law must be that in all cases a man represents by his acts relating to a transaction between himself and another person that he is doing nothing unlawful. That proposition Mr. Matthews calls upon us to affirm. Now, I think an abstract proposition, that when a man does anything he represents that he is not to his knowledge doing anything illegal, cannot be maintained. I think an observation made by Mr. Greene is well founded; he said that a man may not conduct himself in such a way that he must know that a false conclusion is very likely to be drawn from it; but if he is not conducting himself with a view to that conclusion, it is the fault of the person who draws the conclusion and acts upon it. This observation may be more precisely stated thus: before a man can complain of a fraud he must shew there is something done intentionally to deceive him as an individual, or as one of a class, or as one of the public; and it is not enough that he shews certain conduct not done with that view or intent, but which may have that consequence. Now sending infected pigs to market is not a deceit on the public. The person sending them is committing a breach of the law and is risking its consequences, but he is not making a representation of any sort or kind. How would a man innocent in the matter feel affected by such a general rule? A man sends pigs or cattle to market; he thinks that they have no disease, but to his astonishment he is charged with making a representation fraudulent and false to his knowledge. Of course it may be said, if the representation is not false and fraudulent the tribunal ought to decide in his favour; but I think the man has a right to complain that he should have been charged. I think, therefore, with all respect to the opinions that have been entertained elsewhere, that there is no evidence of such a representation as is necessary to maintain this action.

Suppose that an extravagant person, for the sake of display,

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wears handsome rings and drives a brilliant equipage; he purchases of a tailor a coat—the tailor draws the conclusion that he is a man of wealth, for he might reasonably argue no man in his senses would dress so extravagantly or drive such an equipage unless he were a rich man. The tailor readily supplies his customer on the strength of the appearance that he represents. Afterwards, the man does not pay, then the tailor alleges that the man by his conduct has made representations that are wholly false and fraudulent. This case somewhat resembles that. I do not think any person has a right to draw a conclusion from conduct which is not directed to him either as an individual, or as one of a class, or as one of the public, for the purpose of acting on it. I repeat, that I have throughout entertained great doubt on this case, and am not now free from doubt. I would wish to remark that the public in a case like the present, would be protected, because any person committing an act of this description would subject himself to a fine. And I cannot but think that any person who sends pigs to a market, or drives them on a highway, in such a state as to injure those of another by coming in contact with them, would be liable to an action, for there would be a violation of a duty on his part which would be an unlawful act causing the damage. But this would not, I think, help the plaintiff, for I do not think he can recover for the mischief done to his pigs by the defendant's diseased pigs, because they are not the immediate cause of the mischief. The immediate cause of the mischief is the plaintiff buying them and taking them home; if the plaintiff cannot complain of the sale neither can he complain of its consequence.

There is another point in this case. It was argued that the defendant was a fraudulent person, that he had dishonestly affirmed a thing which was false to his knowledge; that is to say, that he dishonestly affirmed that the pigs were not infected with a contagious disease to his knowledge. Now, when we examine the statement of claim that is not averred. The statement of claim, states, "If the defendant did not warrant the pigs, the plaintiff says the defendant either knowingly or having good reason to believe that the pigs were suffering from an infectious disease, exposed the same for sale." There is no charge of fraud; no charge that either the defendant knew he was

representing an untruth, if he was representing it; no charge that it was done with intent to deceive anybody, nor does it contain any charge that he did deceive the plaintiff. I do not find that any question was left to the jury or found by them as to there being any fraud in the defendant, or in what he did, unless the sale of the pigs with knowledge of the disease is itself a fraud. My Brother Lush says in his judgment: "there is nothing here which suggests to the buyer that the pigs were the remnant of a diseased herd, many of which had died; nothing inconsistent with the representation implied by the act of bringing them to market. If this implied representation were put into words, together with the condition, it would be no more in effect than this. 'I believe them to be free from infection, but I will not warrant that they are, and the buyer must take all risks.'" I do not find, therefore, that my Brother Lush put his decision upon the ground that the fraud had been intended, and had conduced to the purchase.

In the result, therefore, on both these grounds, I am of opinion that the defendant is entitled to judgment.

BRETT, L.J. I have come to the same conclusion, but with reluctance. If I thought that at law such conduct as that of the defendant could make him liable to an action I should willingly so hold. But I have come to the conclusion that there was no evidence of a fraudulent representation, because there was no evidence that the defendant ever made any representation.

The case was originally tried before me, and as Lord Justice Bramwell has observed, in the statement of claim there is no allegation of fraud; moreover, there is no allegation of any representation, and therefore there is no allegation of any false representation. At the trial I felt myself embarrassed by this form of the statement of claim. I did not think it right to amend it by inserting a charge of fraud which the plaintiff himself had not made. I had great doubt at the time whether there was any cause of action; but I left such questions as I thought I was entitled to leave, under the circumstances, to the jury, in order that the Court might afterwards consider whether there was any cause of action. But having left those questions, I gave leave to move to the defendant if there was no evidence to

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go to the jury. The defendant took advantage of that leave, and I found my judgment upon that assumption, that the defendant, in so acting upon that leave, gave the go-bye altogether to the form of the pleadings. The question raised in the Court below, and the question before us is, whether, without regard to the pleadings, there is evidence of any cause of action?

The injury of which the plaintiff really complains is this: that he did buy from the defendant pigs which were by reason of disease in themselves entirely valueless; and, moreover, by reason of disease in themselves, were dangerous to other pigs with which they must almost necessarily be placed in contact. That is the ground of the complaint. The plaintiff has to make out that the law gives him a remedy for that injury.

Now the relation between the plaintiff and the defendant was that of vendor and purchaser, and there was no other relation. The pigs were sent by the defendant to a market, and they were put up for sale, not only without a warranty, but with an express notice that they were to be sold with all faults. The pigs were infected with a disease which did, in fact, render them valueless, and which did make them dangerous to other pigs with which they must, almost necessarily, come in contact. I think there was evidence which would have justified the jury in finding that the defendant knew of that disease in the pigs, that he knew the pigs by reason of that disease were themselves valueless, and that he knew that those pigs would be almost necessarily put in contiguity with other pigs, and that they would then infect other pigs. But the defendant made no express representation with regard to the pigs other than this: that he would not warrant them, and that they must be sold with all faults. Under those circumstances it is obvious to every one there was no warranty, and that the plaintiff cannot maintain an action for breach of contract.

Under what form of legal remedy can he maintain his action if there was no breach of contract? I apprehend, where the transaction is as between a vendor and purchaser simply, not between manufacturer and purchaser, the only formula under which the plaintiff can maintain his action for such an injury is, that the defendant made representations to him which were misrepresentations and fraudulent, by reason of the defendant knowing at the

time he made them that they were untrue, and making them in order to deceive the plaintiff. The plaintiff must bring his case, if he can, within that formula. That the defendant made any express representation as to the condition or quality of these pigs must be denied. It is manifest that he did not.

Then the question is reduced to this: Did the defendant by his conduct make any representation with regard to the quality or condition of these pigs? If these pigs had not been sent to a market, and if there had been no crime in what the defendant did, and if the only defect relied on by the plaintiff had been a defect in the quality of the pigs themselves so as to lessen their value, I apprehend that the cases shew there was no implication of any representation by the defendant as to the quality and condition of the pigs. The defendant did nothing to conceal the defect in the pigs. There would have been nothing but the fact of his offering to sell them. Now, that an offer to sell does imply some representation, I think is true. I think that a person who offers things for sale does, by the mere offer, make a representation that he does not know that he has no title to sell them; and, by the mere offer of sale, and by the sale, if afterwards it were proved not only that he had no title, but that he knew he had no title, there would be a representation, and a false and fraudulent representation, on which a plaintiff might recover. I will not say by the mere offer of chattels, or goods, or merchandise, for sale, there may not be some other representation. I do not desire to shut myself out, in future, from considering whether there may not be a representation that he has not, knowingly, himself, done something to the article which he offered for sale which makes it entirely valueless —I do not say whether that is so, or not—but that the seller makes no representation as to the quality of the thing he sells by a mere offer of sale, and that he makes no representation that he himself does not know of a defect in quality is, I think, proved by the cases. The case which is usually cited for that purpose is *Baglehole* v. *Walters* (1), where a vessel was sold with all faults, but the seller knew of a latent defect which, I believe, amounted to making the ship unseaworthy. The seller knew of that, but made no representation in fact, and did nothing to conceal or to

(1) 3 Camp. 154.

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endeavour to conceal the defect. It was held that his knowledge of the latent defect, under such circumstances, gave no right to the plaintiff, the purchaser, to complain of the purchase. That must be on the ground that by offering the ship for sale he did not represent that he did know of a latent defect. But he did know of it, and yet it was held that that would give no valid cause of action. In the case of *Schnider* v. *Heath* (1) there was a similar offer of sale, and a similar defect, and the same knowledge by the vendor of the defect, yet inasmuch as the seller had done something more than the vendor in the previous case had done, namely he had done something to conceal the defect, it was held that that doing something to conceal the defect did amount to conduct that was in effect a misrepresentation, that is, it was putting a false appearance upon the defect which he knew of, and endeavoured to conceal. There it was held that he did, by such conduct, represent that he did not know of the defect, whereas, in point of fact, he did, and took means to conceal it. In that case it was held there was a representation, and a misrepresentation. It seems to me that those cases shew that the mere fact of offering a defective chattel for sale, where nothing is said about quality and condition, and nothing is done to conceal the defect, gives no cause of action, though the seller knows of the defect, and he knows that if the purchaser even suspected him of the knowledge he would not buy: such conduct seems to me to be immoral and dishonest, and dishonest to a high degree, yet there is no remedy because there is no representation.

If that is the law with regard to goods offered for sale not in a market, would there be any difference if the goods were offered for sale in a market? I cannot see any valid distinction between an offer to sell in or out of a market. Is there a representation because the sale, under the circumstances, covers a crime? I cannot see that there would be any implied representation because the seller would be guilty of a crime, when there is no implied representation where the seller is guilty of an immoral or dishonest act. The distinction seems to me to be too refined.

It is said that every one has a right to suppose that a man would not run the risk of committing a crime, and the man must

(1) 3 Camp. 506.

know that it would be assumed that he would not run that risk. I cannot agree to that; it eludes me. I think it is an illusory distinction to say that the seller must be taken to know that the purchaser assumes him not to be committing a crime, but that he is not to be taken to know that the purchaser assumes him not to be wilfully doing only a dishonest thing. Moreover, if the defect is only as to the quality of the thing itself and as to its value, it being assumed that there is no guarantee, it is strong to say that a representation is to be implied, although, as Lord Justice Bramwell has pointed out, the counsel for the plaintiff contended that there was only evidence of a representation, and did not contend that a representation could not legally be implied. I confess I cannot see how there can be evidence of a representation unless there is also a presumption of law. A presumption can only be made when almost every reasonable person, upon hearing the undisputed facts, would draw the same conclusion. If, therefore, the facts are evidence of a presumption, it would follow that the presumption must be made, and that a judge would have to direct the jury that if they believe the evidence they must find presumption. Now, if merely on the ground that the offering for sale upon the facts that are assumed to be true, and the knowledge of the defendant making himself criminally liable, would not prevent a presumption to be made that he intended it to be supposed that he was not guilty of dishonesty, does it make any difference that the defect is not only in the quality of the pigs affecting their own value, but that the defect will cause more pigs to do injury to other pigs? I cannot see that the presumption can be carried any further.

Now, as to the presumption that a man will not run the risk of being convicted of a crime: it is not true; it cannot be true. In this case it would not be true, because the defendant did actually run the risk, and he sent these pigs to market knowing that they were infected with disease. That was a crime, and if his act was known, I apprehend he was fined; but at all events he was liable to be punished. Therefore in this case the defendant did run the risk which it is said everybody had a right to assume he did not intend to run. I cannot see any importance in the fact that the sale was in the market, except that the fact of the pigs being sent

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to market with a knowledge of their condition constituted a crime; whereas if they had been sold under the same circumstances elsewhere, the vendor would not have been guilty of a crime, although he would have been guilty of a grossly dishonest act. Therefore, if we are to make this presumption, it comes to this: that if the defendant had sold the pigs at a farm, under the same circumstances, there would have been no remedy; but because he sent them to a market, and thereby laid himself open to a fine, there is to be the presumption that a representation was made, and the plaintiff is to have a remedy. I therefore think, with great respect, after an anxious consideration, a presumption ought not to be made that the vendor represents that he will not run the risk of committing a crime, neither do I think that a presumption can be made where the defect is not only in the quality of the thing itself as to its value, but also is a defect which will have an effect upon other things. I cannot see how that additional injury affects the question. Is there any more a representation than if that additional injury did not exist? I can see that there is a difference between the case of a thing being infectious and where the defect affects only its own value; but I think there is no legal distinction with regard to the point we have to consider. The decision of the Queen's Bench Division I take to be as follows: that by offering for sale in the market pigs infected with disease, which is an offence owing to the disease, and not only affecting the value of the pigs themselves, but also being capable of extending the disease to other pigs brought in contact with them, there arises a presumption that a misrepresentation was made. I think this decision cannot be upheld. I think we should be introducing a new doctrine as to a presumption. I think that the judgment of the Queen's Bench Division must be overruled, on the ground that there was no evidence of representation, either express or to be implied, and therefore that there was no evidence to go to the jury of any cause of action.

COTTON, L.J. I have arrived at the same conclusion. The only question is, whether or no this claim can be maintained as an action of deceit. The foundation of that action must be false representation. If the representation suggested was made here,

there was sufficient evidence to shew that the defendant knew the representation to be a false one There was no representation by words. Of course there may be a representation otherwise than by words. There may be conduct which may be legally treated as having been pursued for the purpose of representing a certain state of things to exist. If conduct is pursued for that purpose, it is a representation, just as much as if the representation were made in words.

What is relied upon here as a representation is this: that the defendant, knowing the pigs had an infectious disease, sent them to market. Is that evidence on which a jury could find, properly, that the defendant represented that the pigs had not, to his knowledge, any infectious disease? Now, it is remarkable, and it is of importance when you come to consider whether, as a matter of fact, there was such a representation, that the pleadings in no way state that the plaintiff had any representation made to him that the pigs were not, to the knowledge of the defendant, suffering from any contagious or infectious disease; or, that from the pigs being in the market, the plaintiff presumed or inferred, that the defendant did not know that the pigs had any infectious or contagious disease. In the absence of any such statement in these pleadings, or any strong evidence to shew that, as a matter of fact, there was any representation by the conduct of the defendant, ought we to presume that such a representation was made by the mere act of sending these pigs to market? I think it would be wrong to presume that such a representation was made, unless we can come to the conclusion that by sending them to market the defendant intended so to represent. Ought we to infer that the intention of the defendant in sending these pigs to market was to represent or to induce persons to believe (which would be equivalent to a representation), that he did not know they were infected with a contagious disease. Now, I should say that that was not the reasonable conclusion to draw from his sending them to market. That was the ordinary way of getting rid of pigs, and, although the defendant was doing a wrong act,—not only to his neighbour, but an act punishable under the Act of Parliament, in sending these pigs to market,—I think we cannot come to the conclusion, from the mere circumstance of his sending the

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pigs to market, that he in fact did so with an intent to represent that, to his knowledge, there was nothing wrong with these pigs, and nothing that made it criminal for him to send them to market.

Ought we then, as a matter of law, to presume that the defendant made such a representation as suggested by the argument for the plaintiff? To do so would be to impute to the defendant a fraudulent representation when he never intended to make any representation. The plaintiff's argument was based on this, that everybody has a right to be presumed to be innocent until he is found guilty. That is true. But is anybody to be presumed to make a statement that in every act he does he is innocent, or to make a representation negativing the existence of every fact which would make his acts criminal or fraudulent? In my opinion there is no such rule; and I think it would be too great a refinement to imply, from the presumption of honesty, a representation by every one that there is nothing to his knowledge which makes his acts dishonest.

Judgment reversed.

Solicitors for plaintiff: *Abbott & Co.*
Solicitors for defendant: *Rickards & Walker.*

Feb. 4.

EX PARTE STORY.

Ship and Shipping—Certificate of Master, Suspension of—Stranding of Ship—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 242, 432—*Merchant Shipping Act* (39 & 40 *Vict. c.* 80), *ss.* 29, 32—*Jurisdiction of Wreck Commissioner.*

The Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), does not extend the jurisdiction to suspend or cancel the certificate of the master to cases not within the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 242, 432. There is, therefore, no power to suspend the master's certificate where a ship has merely been stranded without material damage to the ship or loss of life.

IN this case a rule nisi had been granted for a certiorari, to remove into the Queen's Bench Division the decision and judgment of the Wreck Commissioner, upon an investigation ordered by the Board of Trade, under the Merchant Shipping Acts, into

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the circumstances of the stranding of the steamship *Ayton*, of which the applicant was master. It appeared that the ship had taken the ground, but was got off again without any damage or loss of life. The Wreck Commissioner had, as a result of the inquiry, suspended the certificate of the applicant for six months.

C. S. C. Bowen, on behalf of the Board of Trade, shewed cause He contended that the effect of the 29th and 32nd sections of the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), was to enlarge the jurisdiction to suspend or cancel the certificate of the master, and that this jurisdiction now existed in all cases where the ship had been stranded through his wrongful act or default.

Maclachlan supported the rule. He contended that the Merchant Shipping Act, 1876, did not enlarge the jurisdiction to suspend the certificate of the master, but merely transferred the power of holding an investigation vested in magistrates by the Merchant Shipping Act, 1854, to the Wreck Commissioner.

COCKBURN, C.J. I am of opinion that this rule should be made absolute. It is necessary to consider the effect of the Merchant Shipping Acts of 1854 and 1876. The 242nd section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), gives power to the Board of Trade to suspend or cancel the certificate of the master, but the power thus given depends on the inquiry which must be previously held under the eighth part of the Act, viz., the group of sections commencing with the 432nd. That section gives jurisdiction only in the following cases, viz., whenever a ship is lost, abandoned, or materially damaged on or near the coasts of the United Kingdom; whenever any ship causes loss or material damage to any other ship on or near such coasts; whenever by reason of any casualty happening to or on board of any ship on or near such coasts, loss of life ensues; whenever any such loss, abandonment, damage, or casualty happens elsewhere, and any competent witnesses thereof arrive or are found at any place in the United Kingdom. It is quite clear that the "casualty" mentioned in the last case, means a casualty by which loss of life occurs. Now, the present case does not fall within any of the classes of cases

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enumerated in the section. In those cases authority is given to certain officials to institute an inquiry before magistrates, and by the 242nd section it is only if "on such investigation" it is reported that "the loss or abandonment of, or serious damage to, any ship, or loss of life," has been caused by his wrongful act or default that the master's certificate can be suspended. By 25 & 26 Vict. c. 63, s. 23, the jurisdiction to suspend or cancel the certificate is transferred from the Board of Trade to the tribunal before which the case is investigated. Then we come to the Act of 1876 (39 & 40 Vict. c. 80). Sect. 29 transfers the power of holding inquiries from the magistrates to the wreck commissioner. It is enacted that "it shall be the duty of a wreck commissioner, at the request of the Board of Trade, to hold a formal investigation into a loss, abandonment, damage, or casualty under the eighth part of the Merchant Shipping Act, 1854, and for that purpose he shall have the same jurisdiction and powers as are thereby conferred on two justices, and all the provisions of the Merchant Shipping Acts, 1854 to 1876, with respect to investigations conducted under the eighth part of the Merchant Shipping Act, 1854, shall apply to investigations held by a wreck commissioner." It is perfectly clear that, so far as this section is concerned, it merely refers to the cases of loss, abandonment, damage and casualty included in the 432nd section of the Act of 1854, and transfers the jurisdiction formerly given to magistrates to the wreck commissioner, and that it does not enlarge the powers or jurisdiction as to suspending certificates. But it is argued that the 32nd section extended the jurisdiction. But that section has no reference to the jurisdiction with regard to the suspension of certificates. It enacts that whenever a ship on or near the coasts of the United Kingdom, or any British ship, has been stranded or damaged, and any witness is found at any place in the United Kingdom, the Board of Trade, without prejudice to any other powers, may, if they think fit, cause an inquiry to be made, or formal investigation to be held, and all the provisions of the Merchant Shipping Acts, 1854 to 1876, are to apply to such inquiry or investigation, as if it had been made or held under the eighth part of the Merchant Shipping Act, 1854. There is nothing, in my opinion, in these provisions giving any

further jurisdiction to suspend the certificate than existed under the Act of 1854. If it had been intended to extend that jurisdiction to all cases of stranding, such intention would, I think, have been expressed in much more specific language. It may be that it would have been reasonable to extend such jurisdiction as suggested. There may be, perhaps, a stranding of the ship without damage, under such circumstances as to shew incompetency or recklessness on the part of the master, as much as a stranding with serious damage. We must not, however, strain the words of the enactment because we may think the effect of the suggested construction would be desirable.

Mellor, J. I am of the same opinion. I can see no words in the Act of 1876 extending the power given to suspend or cancel certificates by the Act of 1854.

Manisty, J. I am of the same opinion. It does not seem to me that the intention of the framers of the 32nd section of the Act of 1876 was in any way to interfere with the law as it existed with regard to the inquiries into matters within the Act of 1854. It seems to have been thought that there were certain cases in which it might be desirable to have inquiries besides those provided for by the Act of 1854, but the jurisdiction to suspend or cancel the certificate is not altered.

Rule absolute.

Solicitors for applicant: *Oliver & Botterell.*
Solicitors for the Board of Trade.

1877 CLARKE *v.* ROCHE AND OTHERS.]

Nov. 7. *Stamp Duties—Appointment of New Trustee—Stamp insufficient at time of Execution, but sufficient at time of date of Deed*—33 & 34 *Vict. c.* 97, *ss.* 15, 16, 17.

A deed, purporting to appoint a new trustee, appeared when tendered in evidence to be sufficiently stamped according to the law in force on the day when it was dated, but it was proved to have been executed some years previously, and the stamp according to the law then in force was insufficient:—

Held, on the construction of 33 & 34 Vict. c. 97, ss. 15, 16, 17, that the deed could not be admitted in evidence.

Gatty v. Fry (2 Ex. D. 265), distinguished.

CASE stated on appeal from the county court of Gloucestershire, holden at Cheltenham. The following are the material facts:—

The suit was for the execution of the trusts of the will of Patience Swinfen, administratrix of the estate, and the removal of the defendant, J. Roche, from the assumed office of trustee under the will.

Patience Clarke by her will devised her real estate to her husband for life, and after his death upon trust for her children, and appointed one J. Pleydell trustee, with a clause that if it should become necessary by reason of death or other contingency to appoint a new trustee or trustees in substitution of any deceased, retiring, or non-acting trustee or trustees, it should be lawful for the surviving, continuing or acting trustee, or if none, for the heirs, executors, or administrators of such deceased trustee from time to time to appoint a new trustee.

Pleydell, after acting in execution of the trust, on the 13th of November, 1870, executed a deed purporting to appoint the defendant, J. Roche, trustee. Pleydell died in December, 1874.

With regard to this deed, paragraph 9 of the case was as follows:—"The deed upon its production at the trial was found to bear date the 3rd of February, 1875, and was stamped with a 10*s.* stamp only, which was insufficient according to the law in force at the time of the execution of the deed. The judge thereupon refused to receive the deed in evidence."

It was proved by the defendant, C. Roche, that the deed had not been stamped until 1875, but had remained in the custody of

C. Roche, brother of J. Roche, and a solicitor's clerk. It was not shewn that J. Roche was aware that the deed had not been duly stamped at the time.

The judge ultimately made a decree declaring that J. Roche was not trustee of the will of Patience Clarke, and the only material question upon the case was whether upon the facts this declaration was right.

Chadwyck Healey, for the appellants. The county court judge was wrong in refusing to admit the deed appointing J. Roche trustee in evidence. The instrument was on the face of it properly stamped, according to 33 & 34 Vict. c. 97 (1), which was in force in 1875, and it was not competent for the judge to receive evidence that the deed was in fact executed in 1870, when (33 & 34 Vict. c. 97, not coming into operation till the 1st of January, 1872) a stamp of greater value was required. *Gatty* v. *Fry* (2) is in point. There a stamped cheque to bearer, though shewn to have been post dated, was held to be admissible in evidence, the Court saying that the Act required that an instrument should have a stamp applicable to that instrument, and not to the instrument coupled with other circumstances.

Archibald Brown, for the respondent. *Gatty* v. *Fry* (2) has no application. It is founded upon the enactments relating to bills of exchange and negotiable instruments, and does not affect the

(1) The Stamp Act, 1870 (33 & 34 Vict. c. 97), by s. 1, comes into operation on the 1st of January, 1871.

By s. 15: "Except where express provision to the contrary is made by this or any other Act, any unstamped, or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of 10*l*., &c."

Sect. 16 contains the terms upon which unstamped instruments which can be legally stamped after execution, may be received in evidence.

By s. 17: "Save and except as aforesaid no instrument executed in any part of the United Kingdom . . . . . shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

In the schedule of duties is the following: "Appointment of a new trustee, &c. . . . . by any instrument not being a will, 10*s*."

By the law previously in force (55 Geo. 3, c. 184, schedule) the appointment of a new trustee as a deed not otherwise charged, nor expressly exempted, required a 35*s*. stamp.

(2) 2 Ex. D. 265.

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case of a deed which, as was distinctly shewn, could not have been properly stamped when it was executed.

Cur. adv. vult.

The judgment of the Court (Cockburn, C.J., and Mellor, J.) was delivered by

MELLOR, J. This was an appeal from the decision of the judge of the county court of Gloucestershire under the County Courts Equitable Jurisdiction Act of 1865.

We felt some difficulty in ascertaining from the contention of counsel and the statement of the case, what it was that we were really called upon to consider. The contention ultimately was reduced to the question, whether the judge was right in declaring that the defendant, the said James Roche, was not trustee of the said will of the said Patience Clarke, deceased. This appeared to depend upon whether the judge was right in refusing to receive in evidence the deed referred to in paragraph 9 of the case. This point is not expressly stated as a question for us, but we assume that it is involved in the question put to us.

It appears that John Pleydell, the trustee under the will of Patience Clarke, was desirous of being released from the trusts of such will, and accordingly by a deed executed by him sought to devolve the farther execution of such trusts upon the said James Roche. On the proof being given of the execution of the deed in question, it appeared to have been executed by the said John Pleydell on or about the 13th of November, 1870, but on its production at the trial it was found to bear date the 3rd of February, 1875, and to be stamped with a 10*s.* stamp only, which stamp was insufficient according to the law in force at the time when such deed was executed. The judge thereupon rejected the deed, and without it there appeared to be nothing to shew the authority of James Roche to act in the administration of the trusts of the will of Mrs. Clarke. The case of *Gatty* v. *Fry* (1) was referred to, in order to shew that the judge ought to have received the deed in evidence, but we think that that case has no application to the present. That was an action upon a cheque which was in fact post dated, and the judgment was based entirely on the provisions of

(1) 2 Ex. D. 265.

33 & 34 Vict. c. 97. The stamp was sufficient on the face of it, and the judgment was based entirely upon the provisions relating to the stamps affecting cheques under that statute.

In the present case the objection was raised on the proof of the execution of the deed, and by 33 & 34 Vict. c. 97, which, after prescribing the terms upon which certain unstamped or insufficiently stamped instruments may be received in evidence, by s. 17 enacts that "save as aforesaid and except in criminal cases no instrument executed in the United Kingdom shall be given in evidence unless it is duly stamped at the time when it was first executed."

We are, therefore, of opinion then that the judge of the county court was right in the conclusions at which he arrived. The appeal must therefore be dismissed.

Judgment for the respondent.

Solicitors for appellants: *Cordwell & Tasman.*

Solicitor for respondent: *W. Rogers, for Powell, Birmingham.*

COLLINGRIDGE *v.* THE ROYAL EXCHANGE ASSURANCE CORPORATION.

Nov. 23.

Insurance against Fire—Interest of Plaintiff at time of Loss—Vendor in Possession—Intended Demolition of Premises under Compulsory Powers.

The plaintiff insured his premises in the defendants' office by a policy which provided that their capital should be liable to pay to the assured "any loss or damage by fire to the buildings" not exceeding 1600*l.* The premises were afterwards required by the Metropolitan Board of Works under their compulsory powers, in order that they might be pulled down for the improvement of a street, and the amount of purchase-money payable to the plaintiff was assessed by arbitration, according to the Lands Clauses Act. After the board had accepted the plaintiff's title, but before he had executed a conveyance, the premises were destroyed by fire:—

Held, that the defendants were liable to pay the plaintiff 1500*l.*, the full value of the buildings at the time of the fire, and not merely the damage done to the buildings considered as old materials, for the dealings between the board and the plaintiff did not affect the defendants' contract.

ACTION to recover 1600*l.* on a policy of fire insurance effected by the plaintiff with the defendants. By consent the facts were stated for the opinion of the Court in the following case:—

1. The plaintiff being seized in fee of the freehold premises

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Nos. 127 and 129, St. John Street, Clerkenwell, Middlesex, on the 1st of May, 1868, insured them in the defendants' office against loss or damage by fire in the sum of 1600*l.* By the policy it was declared that the capital, stock, &c., of the corporation should be liable to pay to the assured any loss or damage by fire to the buildings which should or might happen before the 25th of March, 1869, not exceeding 1600*l.*, and should so continue and be liable from year to year, for so long as the assured should pay 2*l.* 8*s.* to the corporation within fifteen days from the 25th of March in each succeeding year, and it was provided that the insurers should have the option to reinstate buildings destroyed by fire.

2. The premises were at the time of the insurance, and thence until and at the time of their injury by fire as hereinafter mentioned, of the value of 1500*l.*

3. The plaintiff paid the defendants the sum of 2*l.* 8*s.*, as in the policy mentioned up to Lady Day, 1876, but without any notice being given to the defendants of the dealings between the plaintiff and the Metropolitan Board of Works as hereinafter mentioned.

4. On the 19th of May, 1875, the insured premises were injured by fire.

5. The houses and the site thereof were situated within the limits of deviation marking out and defining the property which, by the Metropolitan Street Improvements Act, 1872, the Metropolitan Board of Works was authorized to take and acquire, for the purposes of the new streets and improvements by that Act authorized.

6. On the 16th of December, 1872, the Metropolitan Board of Works, in exercise of their aforesaid statutory powers, gave the plaintiff a notice under s. 18 of the Lands Clauses Consolidation Act, 1845 (which is incorporated with the Act of 1872) that they required to purchase and take the insured premises for the purpose of the Act.

7. The Metropolitan Board of Works and the plaintiff not being able to agree as to the purchase-money and compensation to be paid by them for the purchase of his interest in the premises, the same were duly determined in the manner prescribed by the Lands Clauses Consolidation Act, 1845, by arbitration, and by the

award of an umpire, duly appointed, the sum of 2926*l.* was on the 19th of May, 1873, assessed as the amount of such purchase-money and compensation.

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8. In due course the plaintiff furnished to the Metropolitan Board of Works an abstract of his title to the premises, and the board accepted the plaintiff's title, and the draft of the conveyance was in course of preparation at the time of the fire.

9. The policy never was assigned by the plaintiff, and no notice of any change of interest was given to the defendants or allowed by them under the 6th article of the policy.

10. The defendants objected to pay the 1600*l.* or to rebuild, and alleged that if they were liable at all under the policy, which they disputed, as the premises had been required and taken and agreed to be sold by a binding contract, though not formally conveyed, for the purposes of the new street and other improvements by the Act of 1872 authorized, and that as the premises would be pulled down after the conveyance to the Metropolitan Board of Works, the only sum payable under the policy would be the amount of the damage done to the buildings considered only as old materials.

12. The houses were purchased in order to carry out the street improvement, and they would have been pulled down by the Metropolitan Board of Works for that purpose.

13. The defendants contend that they are not liable to pay anything under the policy, but, if they are so liable, that the loss incurred is incurred by the Metropolitan Board of Works only, and not by the plaintiff, and is restricted to the value of the damage done to the old materials of the houses, which has been agreed upon for the purposes of this case as 125*l.*, and that this sum and no more is recoverable under the policy.

14. The plaintiff contends that the contract under the policy is one of indemnity, and that he is entitled to have the houses reinstated, or to be paid the full value of the houses at the time of the fire, viz. 1500*l.*

The plaintiff brings this action with the assent and concurrence of the Metropolitan Board of Works. The defendants claim, in the event of the judgment of the Court being adverse to them, to exercise their option to reinstate, pursuant to clause 10 of the policy.

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The questions for the opinion of the Court are :—

1. Whether the defendants are liable under the policy to pay anything to the plaintiff.

2. If the defendants are so liable, upon what principle and for what amount the defendants are liable.

Philbrick, Q.C. (*Biron* with him), for the plaintiff. The defendants are clearly liable. The notice to treat served on the plaintiff, the settlement of the amount of the purchase-money, and the acceptance of the plaintiff's title did not deprive him of the ownership of the property. He was in the position of unpaid vendor, with a lien for the purchase-money. The purchaser of property insured does not, in the absence of express agreement, acquire a right to the insurance money: *Paine* v. *Meller* (1); *Poole* v. *Adams* (2), the principle of which is recognised in *Reynard* v. *Arnold.* (3) The plaintiff has therefore an insurable interest, and this is the only matter upon which any real question is raised. [He was then stopped.]

Day, Q.C. (*Willis, Q.C.*, with him), for the defendants. The plaintiff has no sufficient insurable interest in the premises to entitle him to recover. He suffered no pecuniary injury by the fire. There was at the most a damage to the pledge or lien to which he was entitled as unpaid vendor; but this could only be material where there was any doubt as to the solvency of the purchaser, which in the present case could not possibly exist.

[LUSH, J. The contract is not to make good any loss to the plaintiff, but any damage to the buildings.]

The main object of the contract is to indemnify the plaintiff.

Philbrick, Q.C., was not heard in reply.

MELLOR, J. I think that our judgment must be against the contention which Mr. Day has urged on behalf of the defendants. It appears that the plaintiff at the time of the fire was in the position of unpaid vendor, and had possession of his premises. Under these circumstances, I think there is nothing to prevent him from bringing an action to recover the amount which he has insured.

(1) 6 Ves. 349. (2) 33 L. J. (Ch.) 639.
(3) Law Rep. 10 Ch. 386.

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Whether, when he receives this money, supposing that the defendants do not choose to reinstate the premises, he will become trustee of it for the Board of Works, is another question, but I do not see why the unexecuted bargain between him and the board can affect his right to recover. If it were otherwise he would suffer great inconvenience, and would have to rely on the solvency of the purchaser of his property, and though in the present case this purchaser is a powerful corporation, and there is no reason to doubt that the purchase-money will be paid, this is a mere accident, which ought not to interfere with his right to take measures for the protection of his security. The defendants are quite mistaken in supposing that they have only to pay the plaintiff the amount of the loss which, as between him and third persons, he may ultimately sustain.

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LUSH, J. I am of the same opinion. The plaintiff is in the position of a person who has entered into a contract to sell his property to another. The fact that the vendee is so important a corporation as the Board of Works can make no difference. The contract will no doubt be completed, but legally the buildings are still his property. The defendants by their policy undertook to make good any loss or damage to the property by fire. There is nothing to shew that any collateral dealings with the premises, such as those stated in the case, are to limit this liability. If the plaintiff had actually conveyed them away before the fire, that would have been a defence to the action, for he would then have had no interest at the time of the loss. But in the present case he still has a right to the possession of his property, and the defendants are bound to pay him the insurance money, whether he is trustee of it for third persons or not.

14 CLD 299 302.

Judgment for the plaintiff.

Solicitor for plaintiff: *William Wyke Smith.*
Solicitor for defendants: *E. J. Rickards.*

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MOORE *v.* HALL.

Easement—Light, prescriptive right to—Quantum of Enjoyment—Right not to be measured by purpose for which Light actually used—Damages.

In an action for the obstruction of ancient lights, the judge directed the jury that they were to consider whether there had been a sensible diminution of light, so as to make the plaintiff's premises less available for the purposes of occupation or business, to which they were then, or *might thereafter*, be made applicable, and that the damages were to be estimated according to the diminution of value of the premises for such purposes:—

Held, a right direction, on the ground that the purposes for which the premises had actually been used while the light had been enjoyed, were not the proper measure of the right: *Martin* v. *Goble* (1 Campbell, 320), dissented from.

THIS was an action for obstruction of ancient lights. The case was tried before Cockburn, C.J., when it appeared that the plaintiff, as the owner of certain premises, was entitled by prescription to the access of light to certain windows in his premises. The defendant, by erecting a large building on the opposite side of the street, had sensibly diminished the light which found its way to the plaintiff's windows; but there was evidence to shew that the plaintiff's premises being used for the purpose of a cook's shop and coffee-house, and the windows that were darkened being those of rooms only used as bedrooms, the access of light was still quite sufficient for the purposes of the business then carried on. The defendant's counsel contended (inter alia) that the plaintiff was, at any rate, only entitled to nominal damages, and that the plaintiff was not entitled to any damages in respect of the diminution, by reason of the obstruction of light, of the value of the premises for any other purposes than that for which the plaintiff had actually been in the previous enjoyment of the light. The Lord Chief Justice, however, left it to the jury to say whether any sensible diminution of light to the plaintiff's premises had been occasioned by the erection of the defendant's premises, so as to make them less available either for the purposes of occupation or business to which they were then or might thereafter be made applicable. If so, he directed them that the plaintiff was entitled to the verdict; but if they should be of opinion that there was no probability that the premises would ever be applied to other than

their present purpose, and that consequently there was not, practically, any diminution in their value, the damages should be nominal only. If the jury were of opinion that there had been any sensible diminution of light sufficient to lessen or interfere with the use of the premises, or any part of them, for the purpose of occupation or business, then the damage should be substantial, according to the estimate of the jury of the diminution in value of the premises.

The jury found a verdict for the plaintiff, damages 50*l.*

An order nisi had been obtained for a new trial, on the ground that the above ruling amounted to a misdirection.

H. D. Greene, and *Lake*, shewed cause. They were stopped by the Court.

A. Staveley Hill, Q.C., supported the rule. He contended that the Lord Chief Justice was wrong in telling the jury that they might take into consideration the purposes for which the premises might be thereafter made available, and that the measure of damages must be the actual enjoyment that there had been of the light. He cited *Jackson* v. *Duke of Newcastle* (1); *Martin* v. *Goble* (2); *Lanfranchi* v. *Mackenzie* (3); *Yates* v. *Jack* (4); *Dent* v. *Auction Mart Company* (5); *Aynsley* v. *Glover* (6).

MANISTY, J. I am of opinion that this order should be discharged. The facts appear to be as follows. The plaintiff had a building with certain windows, through which the light passed, and this state of things had continued for such a period of time as to entitle the plaintiff to a servitude as against the defendant, the owner of the opposite premises, in respect of such passage of light. That servitude would appear to be the right to have the light flow in the same quantity as theretofore through such windows uninterfered with by the defendant. The defendant did interfere with the flow of such light injuriously, and it is admitted that thereupon a cause of action arose. The question is as to what may be the measure of damages in respect of such cause of action.

The Lord Chief Justice told the jury that they might take into

(1) 3 D.J.& S. 275; 33 L.J. (Ch.) 698.
(2) 1 Camp. 320.
(3) Law Rep. 4 Eq. 421, at p. 427.
(4) Law Rep. 1 Ch. 295.
(5) Law Rep. 2 Eq. 238.
(6) Law Rep. 18 Eq. 544; 10 Ch. 283.

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consideration the character of the neighbourhood, the use to which the plaintiff's buildings were then applied, and also the use to which they might in future be applied. He left it to them to say, considering all the elements of the case, whether the damages were substantial or merely nominal. The only doubt I have is, whether the direction was not too favourable to the defendant. It appears to me that the plaintiff was entitled to the same quantum of light as he had theretofore enjoyed, irrespective of the purpose for which he had enjoyed it. Take this case as an illustration. Suppose an upper room with a window through which the light had been accustomed to pass in a certain quantity and direction. It might be that for many years that room had been used as a bedroom, to which use the full amount of light which actually had passed through the window might not be essential. The owner afterwards lets the room to an artist who makes a skylight. The light so admitted vertically superadded to the light before admitted horizontally makes the room an excellent one for the purposes of an artist's studio. Why should the owner of the servient tenement, who had for many years been allowing a certain amount of light to enter through the window, be entitled to object to the alteration of the purpose for which the light was used? It is really quite immaterial to him for what purpose the light is used. It cannot be, in my opinion, that the servitude is greater or less according to the use of the light which is made by the owner of the dominant tenement. It appears to me that the real question for the jury was what the diminution in value of the hereditament was by reason of the interference with the access of light, and to ascertain that, I think that they were entitled to take into consideration the matters indicated by my Lord's direction.

MELLOR, J. I am of the same opinion. It seems to me that the direction of my Lord to the jury was quite correct. With regard to the case of *Martin* v. *Goble* (1), I agree with the Master of the Rolls in *Aynsley* v. *Glover* (2) in thinking that the actual mode of occupation of the dominant tenement is not the test. I am, therefore, of opinion that the test applied by McDonald, C.B., in *Martin* v. *Goble* (1), was not the correct test. It seems to me

(1) 1 Camp. 320. (2) Law Rep. 18 Eq. 544; 10 Ch. 283.

that the owner of the dominant tenement is entitled to all the light that has been accustomed to come through the particular aperture or window without challenge on the part of the owner of the servient tenement. How is the owner of the servient tenement concerned with, or how can he know anything about, the mode of occupation of the dominant tenement? In *Lanfranchi* v. *Mackenzie* (1) an injunction was claimed on the ground that the access of light had been so far diminished that the room could no longer be used as a sampling room. The injunction was refused on the ground that it was not shewn that the room had been so used for twenty years; and it is said that the Vice-Chancellor in that case approved of the views expressed in *Martin* v. *Goble*. (2) I cannot agree with the Vice-Chancellor that the use of the room as a sampling room for twenty years would, in any other sense, have been material than as a test of the amount of light that had been accustomed to find access to the room during those years. The question what quantity of light actually obtained access through the window in respect of which the prescription is claimed is comparatively simple, but to determine what the extent of the enjoyment had been, with reference to the purpose for which the dominant tenement had been used, would require very different evidence. The purpose might vary from time to time, and there would be great difficulty in ascertaining the quantum of enjoyment tried by this test. The light in this case was in fact enjoyed for the purposes of a cook's-shop and coffee-house, but the use of it for this purpose is not the measure of what the plaintiff is entitled to. It is found that there is an actual diminution of light, and so the defendant's counsel admits that there must be a verdict against him, but he complains of the damages. For the reasons I have given I cannot think his complaint is well founded. I do not think the present actual condition of the premises is the measure of the amount of damage. In estimating the damages you ought not, in my opinion, to stereotype the existing condition of the premises, but to calculate the reasonable probabilities of a different application of them. The jury have estimated those probabilities, and have found a verdict for substantial damages. I have no doubt of the accuracy of that verdict.

(1) Law Rep. 4 Eq. 421. (2) 1 Camp. 320.

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COCKBURN, C.J. The real question appears to be what the servitude is to which the servient tenement is subjected. It is, in my opinion, the right to the admission of a certain quantity of light by reason of certain apertures through which the light has for a certain period been accustomed to obtain access. The question for what purpose the owner of the dominant tenement has thought fit to use that light, to my mind, has nothing to do with the matter. To look at the matter by the light of the actual experience of life: a man builds a house or other building and opens a window in it. Does the owner of the tenement which, if the use of the window continues, will become the servient tenement consider to what purpose the light will be applied? Assuredly not. I quite concur in thinking that *Martin* v. *Goble* (1) was wrongly decided. The matter, in my opinion, to be considered is, whether there is any diminution of light for any purpose for which the dominant tenement may be reasonably considered available. The rooms may now be used as bedrooms, a purpose which may not require so much light as they actually had received, but at any moment they may be put to some other purpose requiring the full amount of such light. With regard to the question of the measure of damages, I apprehend that it must be the diminution in the value of the premises by reason of the diminution of the light. The later authorities appear fully to bear out the view we now take. Lord Cranworth, in *Yates* v. *Jack* (2), says, "The right conferred or recognised by the statute 2 & 3 Wm. 4, c. 71, is an absolute indefeasible right to the enjoymant of the light without reference to the purpose for which it has been used." Vice-Chancellor Wood, in the subsequent case of *Dent* v. *Auction Mart Co.* (3), took the same view, and the Master of the Rolls in the case of *Aynsley* v. *Glover* (4), after reviewing all the authorities, says, "Therefore I think it must be settled or considered settled, at all events, in a case where a reversioner is a party, that the mere change of use of a room will not deprive the party complaining of his right to the access of light; and conversely, that in considering the injury to the light the Court is bound to consider that the room may be used for some other

(1) 1 Camp. 320.
(2) Law Rep. 1 Ch. 295, at p. 298.
(3) Law Rep. 2 Eq. 238.
(4) Law Rep. 18 Eq. 544, at p. 551.

purpose than that for which it is used at the moment when the injunction is applied for." Apply the principle so laid down to the case when the jury have to estimate the damages. It is clear they may consider future probabilities as to the use of the rooms. They may consider not only the actual present use of them, but any purpose to which it may reasonably be expected that in the future they may be applicable. It would be a great injustice to the owner of the dominant tenement if it were otherwise. For these reasons I think this order must be discharged.

Order discharged.

Solicitors for plaintiff: *Tilley & Soames.*
Solicitor for defendant: *H. E. Brown.*

WATT *v.* BARNETT AND OTHERS. *Feb.* 20.

Practice—Substituted Service, Effect of—Order IX., Rule 2—Absence of Notice of Proceedings—Setting aside Judgment—Discretion.

The plaintiff being unable to serve one of the defendants with the writ, obtained an order for substituted service against him under Order IX., Rule 2, and the action proceeded to judgment against all the defendants. The defendant, in respect of whom the order for substituted service had been made, applied to set aside the judgment as against him on affidavits alleging merits and that he had never had any knowledge of the action while it was pending:—

Held, that the judgment signed was regular, even if the defendant had no knowledge of the proceedings, but that the Court might in their discretion set the judgment aside, if it were shewn that the defendant had no knowledge of the proceedings, and that he had merits. Thinking the defendants' affidavits not entirely free from doubt as to these points, they set aside the judgment on terms as to giving security for the amount of the judgment that remained unsatisfied, and for costs.

THIS was an application to set aside the judgment that had been signed against the defendant Barnett. It appeared that he had been sued with four other persons for torts alleged to have been committed by them as directors of a company. The plaintiff, being unable to serve the defendant Barnett with the writ, had obtained an order for substituted service under Order IX., Rule 2, upon a firm of solicitors who had acted for Barnett in another action arising out of the affairs of the same company.

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These gentlemen had refused to forward the writ to Barnett, and had sent it back to the plaintiff's solicitors. The action proceeded, and ultimately the plaintiff got a verdict against all the defendants, and judgment was signed against them. An application was made on behalf of Barnett to Field, J., at chambers, to set aside the judgment so far as it affected him, on affidavits alleging that he had had no notice or knowledge of the proceedings in the action while it was pending, and that he had a good defence on the merits. Field, J., refused to make any order, and the present application was by way of appeal against his decision.

Rolland, for the defendant Barnett, contended that the order for substituted service was not conclusive, if it were shewn that notice of the proceedings never in fact reached the defendant, and that he was entitled to have the judgment set aside unconditionally.

Herschell, Q.C., and *R. Brown*, for the plaintiff, contended that the judgment being regular could not be set aside, or at any rate should not be set aside unless the affidavits satisfied the Court that the defendant had merits and had never had notice of the proceedings. They contended that the defendant's affidavits did not satisfactorily establish these points.

The following cases were cited: *Hope* v. *Hope* (1); *Hope* v. *Carnegie* (2); *Hesketh* v. *Fleming* (3); *Flower* v. *Allan*. (4)

COCKBURN, C.J. The question before us is one of some importance as involving the true effect of Order IX., Rule 2. In the present case it appears that, by reason of the solicitor of the defendant refusing to become the vehicle of service, the substituted service became ineffectual. The question therefore arises whether an order under Order IX., Rule 2, for substituted service is final and conclusive, so that, after the proceedings have gone on to judgment, it is not competent for the defendant to come before the Court and, on the ground that the substituted service has failed, apply for leave to appear and defend the action. It is also argued that at any rate he can only do so if he can produce such an affidavit of merits as to satisfy the Court that they are not

(1) 4 D. M. & G. 328.
(2) Law Rep. 1 Eq. 126.
(3) 24 L. J. (Q.B.) 255.
(4) 2 H. & C. 688; 33 L. J. (Ex.) 83.

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setting aside the judgment fruitlessly, and that the justice of the case would not be better met by allowing it to stand. Now, in the first place, it cannot, I think, be said that the judgment was signed irregularly, inasmuch as the service was in accordance with the order of the Court made under Order IX., Rule 2; but, on the other hand, I think the legislature did not intend that the order for substituted service should be final and conclusive on the defendant, when it can be shewn that the substituted service failed and the proceedings were never brought to the knowledge of the defendant. It is the essential foundation of the administration of justice that a person, against whom an action or other proceeding is brought, should have notice of the proceedings before he is concluded, and therefore I think that, when it is shewn to the Court that the substituted service has failed and the defendant has had no such notice, it is competent to the Court to enable the defendant to come in and defend the action, as he would have been enabled to do if the substituted service had been effectual. At the same time I agree that the matter is one on which the Court ought to exercise its discretion. It is not because the substituted service has failed and never came to the knowledge of the defendant that the Court is absolutely bound to set the proceedings aside, for it may be, that though the action was not brought to the defendant's knowledge through the substituted service, yet it has come to his knowledge in some other way. If he knew of the action and had an opportunity of coming in, but instead of doing so he allowed the proceedings to go on and took his chance of the other defendants defeating the plaintiff, then I think we ought to refuse to set aside the judgment, which is regular by virtue of the order for substituted service, and not to allow the defendant to reopen the litigation. All I hold is that the order for substituted service is not finally binding and conclusive, if the Court are satisfied that through that order injustice will be done if the defendant is not let in to defend, he never having had any knowledge of the action. To apply this view to the present case. Before letting the defendant in to defend we must consider whether he gives us any grounds for thinking that he has a substantial case which he desires to try. If he does not we are not bound to set aside a judgment which we may think

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ought in the interests of justice to stand. Again, does he satisfy us that he had no knowledge of the proceedings? I cannot help thinking that the case made by the defendant is not altogether free from doubt on either of these points. We think, taking the doubt we feel on these points and the other circumstances into consideration, that the proper order to make will be that the defendant shall have liberty to come in and defend, but only on condition that he gives security for 500*l.*, the balance of the judgment remaining unsatisfied, and for the costs of the action to the satisfaction of the master.

MELLOR, J. I come in the result to the same conclusion as my Lord. I think that the object of the 2nd rule of Order IX. was to obviate the difficulties that the plaintiff might be exposed to by reason of a defendant's going abroad and keeping abroad, and it being impossible to effect personal service, and to prevent the plaintiff's right being entirely defeated by reason of these difficulties. It was intended, in my opinion, in such cases to enable the Court to order substituted service, and that when such substituted service is directed it should have all the effects of personal service. Under these circumstances the judgment in this case was perfectly regular; and though I think it is competent to us to let the defendant in to defend, the defendant can, in my opinion, only be so let in on satisfying us that he has merits, and that he had no knowledge of the proceedings. The proceedings being regular, if he had known of them, I think he would have been in the same position as if he had been served with the writ. With regard to the terms on which the defendant ought to be let in to defend, I entirely agree with my Lord.

Order accordingly.

Solicitors for plaintiff: *Linklaters.*
Solicitor for defendants: *Wynne.*

REG. *v.* FRENCH.

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Highway (Turnpike)—Contribution to Repair of, out of Highway Rate—4 & 5 Vict. c. 59, s. 1—Failure to complete whole System of Roads authorized by a Turnpike Act.

An Act of Parliament authorized trustees to establish a ferry and make certain highways in connection therewith. The trustees were likewise empowered to take tolls, out of the proceeds of which the ferry and roads were to be maintained. No limit of time was specified by the Act for the expiration of the trust. The Act also provided that, in case the works thereby authorized should not be executed within the space of ten years, all the powers and authorities thereby given should cease and determine, save only as to so much of the work as should have been completed within that time.

The trustees established the ferry, and made all the roads specified by the Act but one. The funds arising from the tolls becoming insufficient for the repair and maintenance of the roads so made, an application was made by the trustees to justices for an order for contribution to the repair of one of the roads so made out of the highway rate under 4 & 5 Vict. c. 59, s. 1:—

Held, that the trust created by the Act was a turnpike trust, within the meaning of 4 & 5 Vict. c. 59; and secondly (on the authority of *Reg.* v. *York and North Midland Ry. Co.* (1 E. & B. 858)), that inasmuch as the Act merely authorized and did not compel the making of the roads thereby specified, and contemplated that all the works might not be executed, the construction of the whole system of roads authorized to be made was not a condition precedent to the roads that were made becoming highways, and consequently that an order for contribution to the repair of the road in question might be made under 4 & 5 Vict. c. 59, s. 1.

Rex v. *Cumberworth* (3 B. & Ad. 108) not followed.

Affirmed 4 Q.B.D. 507

CASE stated by the Sussex quarter sessions for the opinion of the Court, the facts of which were in substance as follows:—

The respondents were trustees appointed under an Act of Parliament, 5 Geo. 4, c. xciv., being an Act passed for establishing a ferry over the river Arun at Littlehampton, in the county of Sussex, and making roads to communicate therewith. The appellant was the surveyor of highways for the parish of Rustington.

Under and by virtue of the Act the trustees were empowered both to establish a ferry and to make certain roads.

The preamble of the statute recited, "Whereas there is at present no communication between Worthing, Heene, West Tarring, Goring, Ferring, Kingston, Angmering, East Preston, Rustington, and Littlehampton, situate on the east side of the

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river Arun, in the county of Sussex, and Climping, Ford, Yapton, Middleton, Felpham, and Bognor, in the said county, situate on the west side of the said river, but by a circuitous road of several miles, except that there is a ferry for foot passengers only over the said river Arun at Littlehampton aforesaid, and whereas from the greatly increased and still increasing population of several of the above places there is much intercourse between the inhabitants of the east and west sides of the said river Arun, and it would greatly contribute to the advantage, convenience, and accommodation of such inhabitants to have a ferry established for carriages, horses, cattle, and foot passengers and portable articles over the said river Arun at Littlehampton aforesaid, and to have a good road from such ferry on the west side of the said river to and into the road leading from Bognor to Arundel at the west end of Grevatt Lane, in the parish of Yapton aforesaid, and also to have a good road from such ferry on the east side of the said river to and into the village of Rustington aforesaid, with a branch road from the street of Littlehampton aforesaid by the beach-houses to the south end of the lane leading from the church of Rustington aforesaid to the sea shore; and the establishing such ferry, and the making and improving of such roads, would likewise be a great advantage, convenience, and accommodation to the inhabitants of many other places on the east and west sides of the said river Arun, and to all persons travelling along the sea coast of the said county of Sussex."

By s. 16 power was given to the trustees for establishing a ferry.

By s. 18 it was enacted (inter alia) that "it shall and may be lawful to and for the said trustees to make or cause to be made a proper and commodious road for such ferry to be established as aforesaid on the west side of the said river Arun to and into the road leading from Bognor to Arundel at the west end of Grevatt Lane, in the said parish of Yapton, in the said county, and also one other proper and commodious road from such ferry to be established as aforesaid on the east side of the said river to and into the village of Rustington, in the said county, and also a proper and commodious branch road from the street of Littlehampton

aforesaid by the beach-houses to the south end of the lane leading from the church of Rustington to the sea shore, &c., &c., and the same roads shall be made, and at all times afterwards maintained and repaired, at the proper costs and charges of the said trustees, by and out of the tolls by the Act granted except as hereinafter mentioned."

Sects. 49 to 52 and 71 of the Act provided for the taking of tolls, which tolls were to be applicable to the making and repair of the ferry and roads.

By s. 72 it was further enacted that "in case the works hereby authorized to be executed shall not be completed within the space of ten years so as to answer the objects hereby intended, all the powers and authorities hereby given shall cease and determine save only as to so much of the work as shall have been completed within the time."

Upon the 13th of November, 1876, an application was made by the respondents, under 4 & 5 Vict. c. 59, to the court of petty sessions for the upper division of Arundel Rape upon a summons taken out by the respondents requiring the appellant, as surveyor of highways for the parish of Rustington, to contribute to the repair of a certain road from Littlehampton to Rustington, made under the provisions of the above-mentioned Act (the branch road above-mentioned), on the ground that the funds of the ferry undertaking were insufficient for the repair of the roads comprised therein.

After hearing evidence an order was made that the sum of 150*l.* out of the highway rates for the parish of Rustington should be paid by the surveyor of highways of Rustington towards the repair of the road.

The surveyor of highways appealed to the quarter sessions upon the following ground (inter alia), viz., that, the trustees not having made the main road contemplated by the Act from the ferry to Rustington, there was no power to order a contribution towards the repair of the branch road. On the appeal the following facts were admitted or proved:

It was admitted that the road, which is described as the other proper and commodious road from such ferry to be established as aforementioned on the east side of the said river to and into the

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village of Rustington, in the said county, had never been made by the trustees, or at all.

Proof was given that the said road if made would have been of considerable advantage to the inhabitants of the parish of Rustington, whereas the other roads provided for in the said Act, and especially the road in respect of which contribution was sought, had been and was of little or no value to them, and was principally used by residents of and visitors to the neighbouring watering place of Littlehampton.

With the exception of the aforesaid proper and commodious road from such ferry on the east side of the said river to and into the village of Rustington, and with the exception of portion of the road in respect of which the contribution was claimed lying at the extreme west thereof, which portion was made by and at the expense of the parish of Rustington, the trustees had made the several roads mentioned in the Act of Parliament, and had taken thereon the full amount of tolls specified in their said Act, and had expended such tolls in the repair of the said roads and other purposes of the Act. Proof was also given of the inadequacy of the funds of the trust.

The sessions gave judgment in favour of the appellant, subject to a case for the opinion of the Court, on the ground that the completion by the respondents of the whole system of roads specified in the Act was as a matter of law a condition precedent to the right to call upon the parish to contribute to the repair of any part thereof. The question for the Court was whether they were right in so doing. (1)

1877. Nov. 24, Dec. 1. *Cave, Q.C.*, and *Gore*, for the appellant, contended, upon the authority of *Rex* v. *Cumberworth* (2), that the completion of the whole system of roads authorized by the Act was a condition precedent to any of the said roads becoming a highway to the repairs of which the parish could be called upon to contribute under 4 & 5 Vict. c. 59, s. 1. (3) [They

(1) On all the other grounds of appeal the opinion of the sessions was in favour of the respondents.

(2) 3 B. & Ad. 108.

(3) 4 & 5 Vict. c. 59, s. 1, provides that justices at special sessions for highways on proof of the deficiency of the funds, &c., of any turnpike trust, may order payment to the said trust of a portion of the highway rate.

also cited *Rex* v. *Edge Lane* (1); *Rex* v. *Cumberworth* (2); *Roberts* v. *Roberts* (3); *Reg.* v. *York and North Midland Ry. Co.* (4)]

Willoughby and *Lumley Smith*, for the respondents. Their arguments sufficiently appear from the judgments. [They cited *Tamar Manure Navigation Company* v. *Wagstaff* (5); *Reg.* v. *Trustees of South Shields Turnpike Roads.* (6)]

Cave, Q.C., in reply.

Cur. adv. vult.

1878. Feb. 18. The judgment of the Court (Mellor and Lush, JJ.), was delivered by

LUSH, J. We entertained for a time considerable doubt whether this road could be considered a turnpike road within the meaning of 4 & 5 Vict. c. 59, inasmuch as by s. 90 of 4 Geo. 4, c. 95, it is taken out of the General Turnpike Acts, because made under an Act of Parliament passed for an unlimited period. But on further consideration we are of opinion that 4 & 5 Vict. c. 59 is not so limited in its application, and that the sessions were right in so holding. The road is a turnpike trust, inasmuch as tolls are payable upon a part of it, which tolls are applicable to the maintenance of the entire undertaking, and constitute the fund which it was originally considered would be sufficient for that purpose; and the reason for the exceptional provision made by 4 & 5 Vict. c. 59 is as applicable to this road as to one governed by the General Turnpike Acts. Moreover, those portions of the line of road which formed part of an ancient highway would have been entitled to statute labour if that auxiliary had not been abolished by the General Turnpike Act (see s. 86.) We, therefore, adopt the larger construction of the phrase "turnpike road," which was adopted by the Court of Exchequer in *Company of Proprietors of the Northam Bridge and Roads* v. *London and Southampton Building Co.* (7), and hold this to be a road in respect of which it is competent to the justices to appropriate a portion of the highway rate supposing the road to be otherwise within the purview of the Act 4 & 5 Vict. c. 59.

(1) 4 Ad. & E. 723.
(2) 4 Ad. & E. 731.
(3) 3 B. & S 183.
(4) 1 E. & B. 858; 22 L. J. (Q.B.) 225.
(5) 4 B. & S. 288; 32 L. J. (Q.B.) 295.
(6) 3 E. & B. 599; 23 L. J. (M.C.) 134.
(7) 6 M. & W. 428.

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Were it not for the comparatively recent case of *Reg.* v. *York and North Midland Ry. Co.* (1), in error, we should probably have felt ourselves bound by the cases of *Rex* v. *Cumberworth* (2) and *Rex* v. *Edge Lane.* (3) The first case of *Rex* v. *Cumberworth* (2) was put upon two grounds, first, that the Act was to be construed as a contract between the promoters and the public, based upon an entire consideration which created a duty to complete the whole undertaking, and that the statute was to be read as enacting by implication that until the whole line was completed no part was to be deemed to have been done under the authority of the Act, so as to become a public highway. And, secondly, that an acquiescence or adoption by the parish was necessary, in order to cast upon the parish the burden at common law of keeping a newly dedicated road in repair. So far as the decision proceeded upon the necessity of an adoption by the parish, it was overruled by *Rex* v. *Peake.* (4) The judges differed in that case upon the question whether the commissioners in whom the land was vested had the power to dedicate the road to the public, but they all agreed that if a road has been dedicated to, and used by, the public, the acquiescence or refusal of the parish is immaterial. The subsequent cases of *Rex* v. *Edge Lane* (3) and *Rex* v. *Cumberworth* (5) are therefore put solely upon the authority of *Rex* v. *Cumberworth* (6), as cases of a contract founded on an entire consideration. This doctrine was afterwards put to the test by an application for a mandamus to a railway company, who had made part of their line, to compel them to complete the remainder. This Court, with the exception of Erle, J., who delivered a judgment the other way, upheld the doctrine propounded in *Rex* v. *Cumberworth* (6), and affirmed in the two subsequent cases, but the Exchequer Chamber (7), in a well considered and elaborate judgment, reversed it, and their decision was mentioned with approval in the House of Lords in *Edinburgh, Perth, and Dundee Ry. Co.* v. *Philip.* (8) These cases re-affirm the old canon of construction, which appears to have been lost sight of

(1) 1 E. & B. 858.
(2) 3 B. & Ad. 108; 4 Ad. & E. 731.
(3) 4 Ad. & E. 723.
(4) 5 B. & Ad. 469.
(5) 4 Ad. & E. 731.
(6) 3 B. & Ad. 108.
(7) In *Reg.* v. *York and North Midland Ry. Co.* 1 E. & B. 858; 22 L. J. (Q.B.) 225.
(8) 2 Mac. 514.

in the former cases, namely, that it is not for the Court to speculate apart from the words they have used what the intention of the legislature was, but to construe the language of the Act in its plain and ordinary meaning, except where the context requires a different sense to be put upon it. In the judgment of Erle, J., in this Court as well as in the judgment of the Exchequer Chamber, it is pointed out that Lord Eldon's dictum in *Blakemore* v. *Glamorganshire Canal Co.* (1) was either misquoted or misunderstood, his language being, "those who come to parliament for statutes of this description, do in effect undertake that they shall do and submit to whatever the legislature empowers and compels them to do," and not that they "undertake to do whatever the legislature empowers them to do," which is the sense in which the Court seems to have understood them in the former cases.

The Act for making the roads in question nowhere requires the trustees to complete them or either of them. The words of the 18th section are permissive only—"it shall and may be lawful," &c.—and this is the language used as applicable to both sections of the main road, as well as to the branch in question. The same words are used in the 16th clause, which authorizes the trustees to establish the ferry. "The Act gives," to use the language of Jervis, C.J., in *York and North Midland Co.* v. *The Queen* (2), "conditional powers, which, if acted upon, carry with them duties, but which, if not acted upon, are not, either in their nature or by express words, imperative upon the persons to whom they are granted." The duty of fencing from the adjoining land and of applying the tolls to keeping the road in repair, are instances of the duty which follows from the making of the road as a legal consequence of the execution so far of the powers of the Act. This Act contains also the clause which was much commented on in the Exchequer Chamber, namely, that "in case the works hereby authorized to be executed shall not be completed within the space of ten years, so as to answer the objects hereby intended, all the powers and authorities hereby given shall cease and determine, save only as to so much of the work as shall have been completed within the time." Upon a similar clause in the Railway Act which was before the Exchequer Chamber, but which commenced with

(1) 1 My. & K. 162. (2) 1 E. & B. 858; 22 L. J. (Q.B.) 225.

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the words, "the railway shall be completed within five years, and if not completed, &c., the powers of the Act shall expire, except as to so much as shall have been completed;" the Court in their judgment say, "If this section was intended to be obligatory, it would not contain that exception which contemplates that the line may be made in part. It is inconsistent to suppose that the legislature would say in the same section, 'You may complete in part only if you can in five years, and then as to that part the powers of the Act shall continue, but you must complete the entire line in that time.' Upon the whole, therefore, we find no duty cast upon the company to make the railway in any part of this Act of Parliament. On the contrary, the legislature seems to contemplate the possibility of the railway being made in part, or being totally abandoned. In the latter case the powers expire in five years, in the former the statute remains in force as to so much of the railway as shall have been completed within that time, and expires as to the residue. This provision is inconsistent with the intention to compel the company to make the entire line as the consideration for the powers granted by the Act." This reasoning applies with equal force to the Act we are construing as to the Act which was before the Exchequer Chamber, and is entirely at variance with the doctrine laid down as the ground of the decision in the cases upon which the sessions founded their judgment. We cannot help remarking that any other construction would disentitle the trustees to take any tolls either upon the ferry or the West Road.

We are therefore of opinion that the clear intent of the Act was that so much of the roads and branch as was completed within the ten years should become and remain in perpetuity a public road, that, having been thus dedicated to and used by the public, it became a highway, and that, as the funds of the trust were found to be inadequate to keep it in repair, the justices had a discretion to appropriate a portion of the highway rate to its maintenance. The order of the sessions must therefore be quashed.

Judgment accordingly.

Solicitors for appellant: *Palmer, Bull, & Fry.*

Solicitors for respondents: *Senior, Attree, & Johnson, for French, Hardwick, & Harvie.*

[IN THE COURT OF APPEAL.]

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Dec. 21.

LEWIS *v.* THE GREAT WESTERN RAILWAY COMPANY.

Carriers—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 7—*Special Conditions—Wilful Misconduct—Alternative Rates.*

The plaintiff, under a contract in writing signed by his agent, delivered to the defendants certain cheeses to be carried from L. to S. at "owner's risk." As the plaintiff knew, the defendants had two rates of carriage; a higher rate, when they took the ordinary liability of carriers, and a lower, when they were relieved of all liability, except that arising from the wilful misconduct of their servants. In using the words "owner's risk" the plaintiff intended that the cheeses should be carried at the lower rate, and subject to the conditions restricting the defendant's liability. The defendants' servants packed the cheeses in such a manner that during their transit upon the defendants' railway they were damaged, but the defendants' servants did not know that damage would result from the mode in which the cheeses were packed:—

Held, that, as the defendants carried at alternative rates, the condition excepting them from liability when carrying at the lower rate was just and reasonable; and that the injury to the cheeses had not arisen from the wilful misconduct of their servants.

CLAIM: That certain cheeses of the plaintiff were delivered to be carried by the defendants, who so negligently packed and carried them that they were damaged.

Defence: That the cheeses were received and carried, under a special contract signed by the person delivering them, on terms which were just and reasonable, to the effect that they should be carried at "owner's risk," and that the defendants, in consideration of such terms, agreed to carry and carried the cheeses at a lower rate than the rate charged under ordinary circumstances where there was no special contract.

Reply: That the contract referred to in the defence as a special contract was the ordinary consignment note of the defendants' company, the material part being as follows:

"Great Western Railway. Consignment of goods to be carried at owner's risk. The Great Western Railway Company hereby give notice that they have two rates for the conveyance of certain articles; one the ordinary rate, when they take the ordinary

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liability of the carrier; the other a reduced rate, adopted when the sender relieves them of all liability of loss, damage, or delay; except upon proof that such loss, damage, or delay arose from wilful misconduct on the part of the company's servants." "To the Great Western Railway Company. Station 187 . Receive and forward the undermentioned goods to be carried at the reduced rate below the company's ordinary rate; in consideration whereof I undertake to relieve the Great Western Railway Company, and all other companies over whose lines the goods may pass, from all liability in case of damage or delay, except upon proof that such loss, detention, or injury arose from wilful misconduct on the part of the company's servants. I also agree to the conditions and regulations on the back of this note."

That the special contract had no application to the default of the defendants in not properly packing the said goods; and, as to their breach of duty as carriers, that the damage was occasioned by wilful misconduct on the part of the defendant company's servants.

Issue thereon.

At the trial before Lopes, J., without a jury, at the summer assizes, 1877, for the county of Salop, the following facts were proved. The plaintiff, a cheese factor, in business at Market Drayton, in Shropshire, having a quantity of Cheshire cheeses at a warehouse in London, directed one Hutchinson, his agent, to forward them to Shrewsbury, viâ the Great Western Railway. On the 8th of July, the cheeses, 156 in number, varying in size, weighing from 50lbs. to 80lbs. a piece, and, altogether, 3 tons 18 cwt., were delivered by Hutchinson to the defendants' carrier, with a forwarding note signed by Hutchinson in the following terms:—

"Great Western Railway Company.

"Please receive and forward to Mr. George Lewis's order,

"Market Hall, Shrewsbury."

[Here were specified the marks and numbers of the Cheshire cheeses,]

"'Owner's risk.'

"From W. J. Hutchinson, agent."

Hutchinson had been for some years in the habit of sending cheese by the Great Western Railway, and was aware that when sent at owner's risk the rate was less than when the company took the responsibility on themselves; he also knew the conditions in the consignment note used on the Great Western Railway, and that it contained the terms on which goods taken at "owner's risk" were carried; but that note was not in fact signed by him, or presented to him for signature, in respect of the cheeses now in question. The ordinary rate was 60*s.*, the sum fixed by parliament. The reduced rate for cheese was 40*s.* The cheeses were despatched by the defendants from their Paddington station on the 10th, were conveyed along the Great Western Railway, and arrived at Shrewsbury on the 11th of July. They were packed, together with others belonging to another consignee, on their rims in two tiers, one above the other, in one open truck. By this mode of packing and the heat of the weather they were crushed and broken to pieces. Although smaller kinds of cheese of uniform size and from other parts of England might be and usually were packed on their edges and in tiers, yet the greater weight, thickness, and varying size of Cheshire cheeses rendered a different mode of packing necessary, and the cheeses of the plaintiff should have been placed on the flat side and in a single layer only; Cheshire cheeses were generally so conveyed along the Great Western Railway in the counties of Salop and Chester, and three trucks, at least, should have been used to carry the quantity conveyed in the one truck.

The defendants produced a form of the consignment note used on their railway to explain the words "owner's risk" on the receipt note signed by Hutchinson, who admitted his knowledge of the conditions of the consignment note, and it was given in evidence. On the other hand, the plaintiff asked leave to amend his replication, by striking out the allegation that the terms of the special contract were those therein stated, and argued, in the alternative, that if the terms on which the goods were carried were those specified in the consignment note, that there was evidence of "wilful misconduct." The learned judge ruled that the conditions were "just and reasonable" within the Railway

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and Canal Traffic Act, 1854, s. 7 (1); and that there was no evidence of "wilful misconduct" by the company's servants, and gave judgment for the defendants.

J. J. Powell, Q.C., and *John Rose*, for the plaintiff. The replication misstating the terms of the special contract should be amended in accordance with the truth. The forwarding note, containing the words "owner's risk," was the only document signed so as to be a special contract under the Railway and Canal Traffic Act. That, per se, is obviously unreasonable: *Peek* v. *North Staffordshire Ry. Co.* (2); and there is no reference in it to the consignment note whereby the two documents may be connected.

[BRETT, J. But does not the evidence as to the course of business between the consignor and the railway company shew what they meant by "owner's risk?"]

Even if such evidence is admissible, the contract would still be unreasonable. The defendants rely on the alternative rate, which, however, does not necessarily render an agreement reasonable. In *Robinson* v. *Great Western Ry. Co.* (3) and *D'Arc* v. *London and North Western Ry. Co.* (4) goods were carried at a lower rate than the ordinary charge, and yet the condition that they should be "at owner's risk" was held not to absolve the carriers from liability for delay. Improper package is equally outside the condition. What may the parties be assumed to have contemplated when making this agreement? On the one hand that the defendants would pack the cheeses in a proper number of trucks,

(1) By 17 & 18 Vict. c. 31, s. 7, every railway company "shall be liable for the loss of, or for any injury done to, any . . . goods . . . in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice . . . limiting such liability. Provided always, that nothing herein contained shall be construed to prevent" the company "from making such condition with respect to receiving, forwarding, or delivering of any of the . . . goods . . . as shall be adjudged by the Court or judge before whom any question relating thereto shall be tried to be just and reasonable . . . Provided, also, that no special contract between such company and any other parties . . . . shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such . . . goods . . . for carriage."

(2) 10 H. L. C. 473; 32 L. J. (Q.B.) 241.

(3) 35 L. J. (C.P.) 123.

(4) Law Rep. 9 C. P. 325.

and on the other hand that, in consideration of the reduced freight, the plaintiff would relieve the defendants from responsibility for those losses and acts of negligence incidental to the conveyance of goods. Surely he cannot be deemed to have voluntarily abandoned all right to have the ordinary means of conveyance provided. If so, the option of a reduced freight, which nevertheless was a high one, is not a reasonable alternative, and therefore would not make the agreement for such extensive risk reasonable. This is not a case in which the defendants offer the customer a bonâ fide practical choice, either to have his goods carried in the ordinary way for a reasonable remuneration, or at his own risk at a lower rate, which according to Blackburn, J., in *Peek* v. *North Staffordshire Ry. Co.* (1), might make the terms reasonable. Secondly, assuming that "owner's risk" means the terms stated in the consignment note, the plaintiff may claim the benefit of the exception. His cheeses were injured by the "wilful misconduct of the company's servants." "Wilful misconduct" means some conduct not necessarily amounting to a criminal act or a trespass, yet other than mere negligence. To save using two more trucks the defendants intentionally put the cheeses improperly into one truck only. That is not an act of mere negligence. Suppose they had purposely placed the cheese with coals in a truck, or carried them in some other unsuitable manner, would not that be "wilful misconduct?" It could not be said that under such conditions the company might carry a horse standing on an open truck, and yet claim immunity if the animal were injured. The defendants rely on *Glenister* v. *Great Western Ry. Co.* (2), where the Court of Queen's Bench held similar conditions reasonable. There, in order to prevent some cattle being all night in trucks, the railway company's servants humanely removed them into a yard, whence, however, they strayed on to the railway, and, in consequence, a train containing the plaintiff's goods ran off the line, and the plaintiff's goods were injured. But Blackburn, J., said: "It is admitted that there was no malice in what the servants did here, and I fully agree that there may be many cases of wilful misconduct without malice; for instance, if railway servants were to shunt trucks of cattle into a siding and leave them unattended for twenty-four hours; or if a

(1) 10 H. L. C. 473, at p. 513. (2) 29 L. T. (N.S.) 423; 22 W. R. 72.

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railway company were, for economy, knowingly to expose cattle to a risk which they incurred thereby. Here, however, the circumstances do not, in my opinion, amount to wilful misconduct, and I think the judge was wrong in directing the jury that culpable negligence was necessarily wilful misconduct." The defendants knew how Cheshire cheeses should be packed. Evidence was given that they were usually placed on their flat sides in the Great Western trains. Then for the sake of economy of space and trucks, the defendants purposely abstained from adopting the proper means of conveyance.

H. Matthews, Q.C., and *F. A. Bosanquet*, for the defendants. There are three questions for discussion: 1. What is the contract? 2. Is it just and reasonable? 3. Does it exempt the defendants from liability for the damage of which the plaintiff complains? First. The parties meant to make a contract on the terms specified in the consignment note. The phrase "owner's risk" comprises those terms. It is enough that the condition limiting liability should be in writing signed, to satisfy the requirements of the Act, and the surrounding facts may be regarded in order to construe the written condition. Amongst them is the fact that the consignor was aware of the two rates, chose the lower, and when sending the goods at "owner's risk" knew that he was sending them on the terms stated in the consignment note. Interpreting the signed condition by the light of those facts, it is apparent that the contract actually made was that the cheeses should be carried on the terms stated compendiously in the forwarding note and fully set out in the consignment note. But even if "owner's risk" stood alone, the condition would be reasonable: *Stewart* v. *London and North Western Ry. Co.* (1); and would, where an alternative rate is offered, excuse all negligence except delay: *Robinson* v. *Great Western Ry. Co.* (2). The conditions "with respect to receiving, forwarding, and delivering" goods do not apply to delay.

[BRETT, J. Those cases would cover even wilful misconduct or trespass? Do you say that, where there is an alternative, *any* terms may be imposed?]

That is the contention. The option of sending the goods at the

(1) 3 H. & C. 135; 33 L. J. (Ex.) 199. (2) 35 L. J. (C.P.) 123.

ordinary rate, which in this case was the parliamentary rate, and therefore not exorbitant, renders the alternative contract offered by the company reasonable whatever the terms may be, whether they exempt from liability for accident, negligence, trespass, or felony. But "owner's risk" in the present case must be deemed to exclude "wilful misconduct" of the company's servants, and therefore was certainly reasonable. Reasonableness is a mixed question of law and fact. In *Beal* v. *South Devon Ry. Co.* (1) a condition excluding liability for loss from any cause whatever, other than gross neglect or fraud, was held reasonable. See also: *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (2). In *Gregory* v. *West Midland Ry. Co.* (3) Bramwell, B., says: "Whether a condition be reasonable or not cannot be decided as a pure matter of law. It is a question which should be decided by the judge at the trial." And Lopes, J., has decided the question. The reasonableness of each condition must depend on the circumstances of the particular case, and the Court cannot be called on to define abstract reasonableness. The existence of a bonâ fide alternative rate makes reasonable that which might otherwise be not so. Here a real freedom of choice was left to the consignor. The conditions are the same as those in *Glenister* v. *Great Western Ry. Co.* (4), which is a conclusive authority in favour of the defendants. Blackburn, J., in that case says that where there is a bonâ fide alternative *any* terms whatsoever agreed to may be imposed. But here wilful misconduct is excepted.

[They referred also to *McCance* v. *London and North Western Ry. Co.* (5); *Rain* v. *Glasgow and South Western Ry. Co.* (6); *Carr* v. *Lancashire and Yorkshire Ry. Co.* (7); *Gallagher* v. *Great Western Ry. Co.* (8)]

Lastly, wilful misconduct may be defined as doing wrong knowing that it will cause damage: wilful omission might come within the definition; as, for instance, a wilful omission by a pointsman to turn the points on a railway. Here there was no wilful act.

(1) 5 H. & N. 875; 29 L. J. (Ex.) 441; 3 H. & C. 337.

(2) 2 B. & S. 122; 31 L. J. (Q.B.) 113.

(3) 33 L. J. (Ex.) 155, at p. 157.

(4) 29 L. T. (N.S.) 423; 22 W. R. 72.

(5) 31 L. J. (Ex.) 65.

(6) 7 Sc. Dec. (3rd series), 439.

(7) 7 Ex. 707; 21 L. J. (Ex.) 261.

(8) 8 Ir. L. R. C. L. Rep. 326.

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At most the evidence only shews that the cheese was improperly packed by persons in London who could not be expected to know the peculiarities of this class of cheese, and are not shewn to have known them, or that the mode of packing was wrong. Even if they were to some degree careless, the company will be protected by the condition. The claim itself alleges only negligence.

Powell, Q.C., replied.

Bramwell, L.J.

BRAMWELL, L.J.:—This judgment should be affirmed. We would, if necessary, amend the replication as we are asked to do, but I think that the contract is correctly set forth in it. According to the decision of *Peek* v. *North Staffordshire Ry. Co.* (1), a special contract under the Railway and Canal Traffic Act, 1854, is not valid unless signed. We must therefore look at the document signed by Hutchinson, and interpret it. But we must interpret it by the rule which Parke, B., enunciated, and which is cited by Blackburn, J., in *Peek's Case.* (2) This is the contract: "To the Great Western Railway Company. Please receive and forward to Mr. G. Lewis' order, Market Hall, Shrewsbury," certain goods enumerated. "Owner's risk. W. J. Hutchinson." Speaking with great strictness, the consignment note ought not, I think, to be looked at. It is not referred to in the statement I have read, nor is it incorporated with it, and, if the two were put together, no necessary reference to the consignment note would appear in the document signed by Hutchinson. But I think it is a rule of evidence or law that where words are used which would comprehend some other than one necessarily exclusive meaning upon which the judges are to put an interpretation, then, as Parke, B., said, all the surrounding circumstances, and the course of dealing between the parties, not only may, but must, be looked at to ascertain the meaning of those words when used in reference to those surrounding circumstances and that course of dealing; and therefore I cannot doubt that in this case there was a course of dealing between the consignor and the Great Western Railway Company, by which goods were sent and carried under two kinds of contract, and that, under the first kind, goods were carried at one rate by the company with an

(1) 10 H. L. C. 473; 32 L. J. (Q.B.) 241. (2) 10 H. L. C. at p. 516.

ordinary carrier's liability: the liability of insurers: and that under the second, goods were carried at another rate with what was compendiously termed "Owner's risk," which, when the course of business between the parties is regarded, means at the risk of the owner in consideration of the lower rate, plus the liability of the company for the "wilful misconduct" of their servants. Now I think that is the proper interpretation of the document signed by Hutchinson,—an interpretation obtained, not by joining the consignment note to it but, by regarding the course of business between the consignor and company. To illustrate this: if the contract were for the sale of goods, and contained the words, "I buy of you so much goods at the price I mentioned yesterday," or, "I will pay you 50*l.* for them, the credit to be that I mentioned yesterday," there would not be a contract in writing under the Statute of Frauds. But, suppose the words were, "I will buy the goods," and so forth, "at the usual credit," and then it had been shewn that there had been a course of dealing between the parties for years, and there had been a usual credit, surely that evidence might have been given, and it could not be said that there was not a sufficient contract under the Statute of Frauds. Again, suppose a mercantile document had in it the words "prompt as customary," what that was might surely be shewn, or "according to the Rules of the Liverpool Cotton Association," what those were also. On these considerations, I am of opinion that the course of dealing between these parties, not only may, but must, be regarded, and then there is abundant evidence to shew the meaning of "owner's risk" to be that the goods are carried at the lower rate in consideration of the condition, on the one side, that the company will be bound, under the circumstances, to take the lower rate, and cannot demand more, while, on the other side, the consignor sends the goods at the risk of the owner, plus the liability of the company for the wilful misconduct of their servants. Such is the proper meaning of the term, and therefore I think that to alter the replication would not be to amend, but to falsify it, whereas at present it is true. If so, we have next to consider the question whether this contract is just and reasonable? Now it has been decided that a contract of this kind, though in writing, must be just and reasonable under the statute. By that decision

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of the House of Lords I am of course bound. But, in the absence of it, I might almost go so far as to say that I never could bring myself to hold a contract, which the parties had agreed to, otherwise than just and reasonable. Possibly some terms might be so utterly preposterous that they could only have been entered into by a person in a state of hallucination, and therefore such a bargain would not be just and reasonable. But it would require the very strongest evidence to satisfy me that where such a contract as the one before us is made between a carrier and a man who was in the habit of employing that carrier, and had the option of entering into the contract as it stood, or of entering into another contract with the usual liability of a carrier, viz., insurance at a higher rate, the contract so made is not just and reasonable. *Peek* v. *North Staffordshire Ry. Co.* (1) does not apply. The company there said in effect to the consignor, "We will not take your goods on reasonable terms as insurers, but will take them upon other terms, not being insurers." So there was no real alternative offered. But here the plaintiff might at his option have had his goods carried by the defendants as insurers at the 60*s.* rate, a sum which their Act entitled them to charge, whereas in *Peek's Case* (1) the railway company had no right to demand the toll they sought to exact for carrying the goods with the ordinary liability of common carriers. The present defendants gave to the plaintiff an option by saying, "Send your cheese, if you please, at the rate we have a right to charge you, and we will take the liability of carriers, that is, we will be insurers, and undertake that your cheeses shall arrive in as good a condition as that in which they started, whatever may have caused any loss or damage to them, unless it be their own 'inherent vice.'" Those are one set of terms. The other set is, "Pay us a less sum, and take upon yourself the risk of damage, less that risk which arises from the wilful misconduct of our servants, and we will charge you that sum in consideration of your so doing." Now can it be said that that is an unreasonable contract? Even were the exceptions of the risk of wilful misconduct of the defendants' servants omitted from the terms, I should think it would be impossible to hold the contract unreasonable. Do we not feel assured that if we to-day held this

(1) 10 H. L. C. 473; 32 L. J. (Q.B.) 241.

contract unreasonable and that the plaintiff was foolish to make it, he would to-morrow enter into a similar contract, saying to the railway company, "Pray carry my goods at the 40*s.* instead of the 60*s.* rate. I will run the risk." Then, if that contract came again before us, how could we hold that it was not just and reasonable? It would be impossible to do so. Then would it be unreasonable for a railway company to say to a man of business, and competent to judge for himself, "We are continually told that our servants are negligent, sometimes they are; we are also often told that they are guilty of wilful misconduct, sometimes they are; but we wish to avoid examining and contesting such assertions, so we will carry your goods at a lower rate, if you will spare us inquiry as to whether any damage that happens to them has been occasioned by either of those causes, and will take the consequences." Were such terms proposed, explained and accepted, I fail to understand how any Court would hold they were not just and reasonable. But I think that the question in this case ought to have been dealt with upon the footing that the words "except for the wilful misconduct of servants" were in the agreement; although the observations I have made would have been equally made by me even if they were not; and I would further remark that the clause is not an absolute protection. I am much inclined to think that, if the directors of the railway company were to order that whenever goods came upon those terms they should be put in different trucks, and it turned out that the trucks were not the trucks appropriate to those goods, that would not be the wilful misconduct of the company's servants, because they would be only obeying orders, and not doing anything wrong, and the company might be held to be liable. Therefore, whichever interpretation is given to this—whether the terms are considered with or without the exception of wilful misconduct of the company's servants—I cannot but think the condition just and reasonable.

The burthen of proof is, I suppose, on the company. The proviso of the Act is, "that nothing herein contained shall be construed to prevent the . . . companies from making such conditions . . . as shall be adjudged by the Court or judge before whom any question relating thereto shall be tried to be just and reasonable." But to my mind the most cogent evidence that the conditions are

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just and reasonable is afforded by the fact that the plaintiff entered into this arrangement; he is a cheesefactor, who knows how cheese will bear travelling, how it ought to be packed, and what its risks are, yet he consents to be bound by the contract, and trusts to the ingenuity of counsel to shew that in some way or another the contract is not just and reasonable. I am of opinion that it is a just and reasonable contract, whether taken with or without the qualification I have discussed.

The next and only other question is, was this damage caused by the wilful misconduct of the defendants' servants? Mr. Powell's argument, when analysed, is to this effect. "The conduct of which we complain was their conduct, and that conduct was misconduct, and it was not accidental, therefore it was wilful." So that, in the result, unless a thing is a pure accident, it is wilful. If a man were walking along and tripped over some goods which he did not happen to see, it would be said that the tripping was the result of his conduct, which was *mis*conduct—not accidental but wilful—and that the wilfulness was in not looking out. I do not, however, think the question can be thus dealt with. There is such a mass of authorities to shew what "wilful misconduct" is, that we should hardly be justified, as a Court of Appeal, in departing from them, even if we thought them to be wrong. "Wilful misconduct" means misconduct to which the will is a party, something opposed to accident or negligence; the *mis*conduct, not the conduct, must be wilful. It has been said, and, I think, correctly, that, perhaps, one condition of "wilful misconduct" must be that the person guilty of it should know that mischief will result from it. But to my mind there might be other "wilful misconduct." I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, "Now this may or may not be a right thing to do." He might say, "Well, I do not know which is right, and I do not care; I will do this." I am much inclined to think that that would be "wilful misconduct," because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be wilful misconduct. Is there any evidence of such

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wilful misconduct here? I really think there is not. It is said that more cheeses were packed in this truck than there ought to have been, and that they were packed in the wrong way. Well, I think there is abundant evidence that if these cheeses had been packed at some place in Cheshire or Shropshire, where they are commonly packed, in order to come to London, they would have been packed differently, and that the right conclusion for the learned judge to have drawn from the evidence would have been that men who were in the habit of packing them, and usually packing in a different manner, must have known that by packing them in this way they were packing them in an unusual, and therefore presumably wrong, way. But I cannot think that there was evidence in this case to shew, or on which the learned judge could properly find, that the men who packed these cheeses —who were in London, a place from which much Cheshire cheese is probably not exported—knew that they were doing wrong, or, at all events, that they were aware that mischief might result, and that they, improperly, failed to inform themselves as to whether mischief would or would not result from it. The learned judge who tried the case has found to the contrary, and we ought not to reverse his decision unless we are satisfied that he was wrong. I think he was right, and that the appeal must fail.

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BRETT, L.J. I give no opinion as to whether an amendment was required or not, because if the pleadings did require amendment they ought to have been amended. I shall consider the case, therefore, without regard to the pleadings. Upon the real facts the first question is, whether the company have obtained such a document as gives them some exoneration at least from their ordinary liability as common carriers of these goods. That they did possess a document sufficient to give them some exoneration—if that document was reasonable—is beyond doubt. They have a paper containing conditions as to the carriage, which is admitted to be signed by the consignor, and unless it be unreasonable it is a sufficient writing signed by the consignor as to the conditions of carriage. Then what is the proper construction of that document? It has no words in it referring to any other document, therefore I apprehend that it must be construed by itself, and, as has often

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been said, within the four corners of it, and that we could not introduce anything which is on the consignment note into it, for there are no words of reference in the one to the other, and therefore it cannot be considered as incorporated by reason of reference. I think we have to construe the signed document by itself, but that in construing it we have a right to avail ourselves of all the ordinary rules of construction, and of all the recognised aids which judges are entitled to make use of in order to construe a written document. Now I apprehend that, in order to construe a written document, the Court is entitled to have all the facts relating to it and which were existing at the time the written contract was made, and which were known to both parties. Certain facts existing at a time when a written contract is made are sometimes customs of trade, or the ordinary usages of trade; sometimes the course of business between the parties; sometimes they consist of a knowledge of the matter about which the parties were negotiating; the Court is entitled to ask for those facts, to enable it to construe the written document; not simply because they are customs of trade, or the course of business between the parties, but because they are facts which were existing at the time, and which have a relation to the written contract, and which are things which must be taken to have been known by both parties to the contract. Here there were certain facts given in evidence which, I think, we are entitled to look at to enable us to construe the phrase "owner's risk." The facts known to both parties, as I take it, upon the evidence, were that the Great Western Railway Company had two rates of charge, and that when persons elected to send goods at the one rate the senders and the company understood that the goods were to be taken with the common carrier's risk, and that when they elected to send the goods at the other rate both parties knew that the company were taking them upon different terms; and more than that, it was proved here that the consignor and the Great Western Railway Company knew what those other terms were. They both knew that those terms were that the company should be absolved from all risk, except the wilful misconduct of their servants, and both parties knew that the phrase "owner's risk" was used commonly between them where one of those two liabilities was intended to be incurred. Those facts being known

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to both parties, we have to construe the phrase "owner's risk." If the liability were inconsistent with either of those two contracts, we could not attribute it to that one with which it was inconsistent, notwithstanding any knowledge obtained as to the facts surrounding the transaction. But here "owner's risk" might be applied to the more limited liability of the company and to the form of contract under which, I say, both parties knew the company was in the habit of carrying; and, under those circumstances it seems to me that within the very terms of the document signed we should construe "owner's risk" as meaning, between these parties, that the company were to be absolved from all liability for damage in the carriage of these goods, unless that damage was caused by the wilful misconduct of their servants. Now, that being the interpretation of the contract, the question arises whether such condition is just and reasonable? If there had been no real alternative rate which the consignor might elect to take, I should have said that the cases shew that the condition which absolved the company from the negligence of their servants would be unjust and unreasonable; but it has been held, and I think that we ought and are bound to hold, that where there is a real alternative rate—and so a real power of choice left to the consignor as to the rate at which he can send his goods—that that is a power given to the consignor which may make conditions reasonable and just, which would be unjust and unreasonable if there was not that power of election. Therefore, so far, the contract having this exception in it of the wilful misconduct of the defendants' servants, I think we ought to say that the considerations here are just and reasonable, and I think there is authority in the cases which have been cited for declaring that to be the true construction. Although there is the alternative rate of carriage, if the exception as to the wilful misconduct of the defendants' servants had not been in the document, I confess I should at least have hesitated very much before I could have held, or consented to a judgment affirming, that the terms were fair and reasonable. I am not prepared to say that the agreement of the parties to specific conditions is conclusive proof that those conditions are just and reasonable, even although there is an alternative rate; and I regret that I cannot, as at present advised, agree with what

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Bramwell, L.J., has said upon that subject, and I do not think that the agreement of the parties to specific conditions written into the contract is conclusive, so that the Court must hold those conditions to be just and reasonable. On the contrary, the inclination of my opinion is that even though the parties had agreed to them, and the conditions were specified, and even if, as my Lord suggested, after a decision of the Court, the consignors were again to agree to send their goods on the same terms, it would be for the Court, notwithstanding, to say, when all the facts undisputed or found were laid before them, whether the conditions were just and reasonable, and if they were unjust and unreasonable on the first occasion, then, as far as I can see, on the second supposed occasion they would be equally unjust and unreasonable. The consent of the parties does not make that reasonable and just which in the opinion of the Court is unjust and unreasonable, therefore I should hesitate to go so far; but it is not necessary to do so for the decision of this case. Assuming the construction of the contract to be as I have said, it has in it the exception as to the wilful misconduct of the company's servants; there is a real alternative rate for the two contracts, and therefore I think that the contract into which those parties did enter, or, rather, the conditions into which they entered, must be held to be fair and reasonable. If that be so, the only question is whether it can be said that the learned judge was wrong, in finding that there was not wilful misconduct on the part of the railway company's servants. In a contract where the term wilful misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do or to omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing which he is doing is wrong; I think that if he knows that what he is doing will seriously damage the goods of a consignor, then he knows that what he is doing is a wrong thing to do; and also, as my Lord has put it, if it is brought to his notice that what he is doing, or omitting to do, may seriously endanger the things which are to be sent, and he wilfully persists in doing that against which he is warned, care-

less whether he may be doing damage or not, then I think he is doing a wrong thing, and that that is misconduct, and that, as he does it intentionally, he is guilty of wilful misconduct; or if he does, or omits to do something which everybody must know is likely to endanger or damage the goods, then it follows that he is doing that which he knows to be a wrong thing to do. Care must be taken to ascertain that it is not only misconduct but wilful misconduct, and I think that those two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission. Such being the construction of the words, the question is, whether the learned judge was right or wrong in the decision to which he came; considering that these goods were sent from the Great Western Railway station in London and that there is no evidence of any peculiar knowledge on the part of the railway officials there as to the mode of loading these cheeses—there is really no evidence as to any knowledge on the part of the persons who packed these cheeses—I not only think that my Brother Lopes was right in the decision to which he came, but I confess it seems to me that there was no evidence which could have been properly submitted to a jury as to any wilful misconduct on the part of those who packed these cheeses. I therefore think that the judgment of my Brother Lopes was right, and that our judgment must be for the defendants.

COTTON, L.J. The question in this case is whether, having regard to s. 6 of the Railway Traffic and Canal Act, 1854, the company can make a contract or conditions between themselves and the plaintiff which relieve them of liability in the present case. The first question for us is what is the contract? It is conceded by the plaintiff's counsel that the document signed by Hutchinson must be considered as the contract. What are its conditions? We must construe it as we should any other written contract, remembering only that the Act requires that there must be a valid contract in writing signed, and that the conditions of it must be reasonable. The only part of the present contract we need now consider is the term "owner's risk." The document signed by Hutchinson does not in any way refer to the consignment note, and I do not treat the document as if the note were embodied

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in it, nor do I refer to the consignment note as by itself enabling us to put a construction on the contract in the document signed by the plaintiff's agent. But in this, as in all other cases, we are entitled to look to the surrounding circumstances; we cannot look to the acts of the parties for the purpose of finding what their intention was, but we may look to the course of dealing of the parties to see whether they have given a conventional meaning to any terms used in the contract, and then the question becomes one simply of construction of the contract. From the evidence it appears that the plaintiff had sent goods to the railway company previously in exactly the same manner as in the present case, viz., under a consignment note, containing the words "owners' risk," and that it had been acted upon by the railway company sending the goods at the lower rate, and, in fact, with the condition that they were not to be liable except for wilful misconduct of their servants. The plaintiff knew that, and that he and the company had treated the words as meaning the same thing. Therefore we are justified in arriving at the conclusion that, upon a proper construction of that written document, it was a contract as between the plaintiff and the railway company by which the plaintiff contracted to send his goods subject to that condition under which they agreed to take them. It is a contract in writing therefore signed by him, containing the condition that the railway company carrying at the lower rate shall not be liable, except for wilful misconduct on the part of their servants. Was that a just and reasonable condition within the meaning of the Act? For although there is a signed contract we are bound by the decision of *Peek's Case* (1), from which I do not for one moment dissent, to consider whether they are so. A thing cannot be said to be in the abstract reasonable. We must in dealing with it take into consideration the facts in reference to which it would be reasonable or unreasonable, and one of those facts is this, viz., whether or no the party who has signed the contract had it forced upon him without an option, or whether the railway company gave him the option of having his goods carried in some other way. So, no doubt, the alternative contract is a circumstance, and a most material circumstance, in consider-

(1) 10 H. L. C. 473; 32 L. J. (Q.B.) 241.

ing whether or no the condition is reasonable; and in this case, having regard to the fact that there was an alternative contract into which he might have entered to have the goods carried at the parliamentary rate, with all the liability upon the company of common carriers, and having regard also to the decisions on this actual condition, I certainly think that we ought to hold that the condition is a reasonable condition. But I must not be deemed to assent to the proposition at one time pressed on us in argument, that if there is an alternative contract open to parties sending goods, no condition of the contract signed by him can be held to be unreasonable within the meaning of the Act of Parliament. Were it necessary to decide any such question, I should certainly take time to consider it. But it is not, and I refrain from expressing any opinion on it. Then the sole question for decision is really this, viz., whether a condition in these terms does or does not protect the company, that is to say, whether there was or was not wilful misconduct on the part of the servants of the company. Now, I do not think there can be any doubt at all that wilful misconduct is something entirely different from negligence, and far beyond it, whether the negligence be culpable, or gross, or howsoever denominated. There must be the doing of something which the person doing it knows will cause risk or injury, or the doing of an unusual thing with reference to the matter in hand, either in spite of warning or without care, regardless whether it will or will not cause injury to the goods carried or other subject-matter of the transaction. It was asked by counsel in argument would it not be wilful misconduct on the part of the servants of the Great Western Railway Company to put a horse into an open truck? Certainly it would, because every one must be aware that putting a horse into an open truck, out of which he could jump, would, in all probability, lead to the consequence that as soon as the train started the horse would try to jump out and be seriously injured. We have now to deal with the servants of the railway company loading cheese, but it is not every one who knows that cheese of this description will be injured if packed as these cheeses were packed. Nobody could say that all cheese would be damaged by the mode of packing adopted in this case. It is in evidence that cheeses—which presumably may be a large proportion of the cheeses coming to

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Paddington—are packed just as these cheeses were packed. Then it was said that cheeses—which it may be supposed come also to the Great Western at Paddington—of this particular class are packed in this particular way. Obviously the persons who would have to unpack the trucks do not look so carefully at the mode in which they are packed as when they pack them—I mean that if the attention of the servants of the railway company were called to the two modes of packing, I do not know whether they would at once observe that cheeses coming from one district were packed in one way, and those from another district were packed in another way. If they did, they would not necessarily know the reason, or that cheeses were improperly packed, or packed in such a way as to cause damage to them, when they were put on their edges one tier above the other. Persons in Shropshire and Cheshire would, of course, look upon the matter in a different light, and therefore to my mind the evidence of the witnesses from those counties who said that they would not have packed cheese in this way, does not really shew that the servants of the company at Paddington—and they are the servants with whose conduct we have to deal—were guilty of misconduct, certainly not of wilful misconduct, when they packed the cheeses in the manner which is said to have led to the mischief. Therefore, not only do I hold that the learned judge was right in the decision to which he came after seeing and hearing all the witnesses, but so far as I can satisfy myself from the evidence, or on the portion of it which has been read to us, I myself should have arrived at the same conclusion.

Judgment affirmed.

Solicitors for plantiff: *J. & F. Needham, for Morris.*
Solicitor for defendants: *R. R. Nelson.*

HALL AND ANOTHER *v.* PRITCHETT.
THE CORPORATION OF HUDDERSFIELD, GARNISHEES.

1877
Nov. 7.

Attachment of Debt—Garnishee Order—Salary not yet payable—County Court Rules, 1875, *Order XXIV., Rules* 3 *and* 4.

The salary of a medical or other officer cannot, before it is actually payable, be attached by a garnishee order under the County Court Rules., 1875, for it is not "a debt, due, owing, or accruing" to the judgment debtor.

Jones v. *Thompson* (E. B. & E. 63; 27 L. J. (Q.B.) 234), followed.

APPEAL by way of motion from the County Court of Yorkshire, holden at Huddersfield.

On the 15th of June, 1877, an order was made by the county court for the attachment under the County Court Rules, 1875 (1), of salary due from the garnishees to the judgment debtor, and directing that the sum of 20*l.* 16*s.* 8*d.*, or so much thereof as should be due on the 30th of June then next, be attached and be then paid to the plaintiffs in part satisfaction of the plaintiffs' judgment debt of 21*l.* 2*s.* 2*d.*

It appeared that Pritchett, the judgment debtor, had been appointed by the corporation as medical officer of health for the borough of Huddersfield under the Public Health Act, 1872, at a salary of 250*l.* per annum, payable quarterly in July, October, January, and April, but, as a matter of convenience, he received from the corporation every month a proportion of his salary, amounting to 20*l.* 16*s.* 8*d.*

The motion was to set aside the order and enter judgment for the garnishees, on the ground that the debt attached was not due, owing, or accruing at the time of the issuing of the summons, or at the date of the order.

(1) By the County Court Rules, Order XXIV., Rule 3, a plaintiff may, at any time after the judgment and "upon lodging . . . . an affidavit stating the fact of the judgment and of its being unsatisfied, and that a third person (hereinafter called the garnishee) is indebted to the judgment debtor and is quoad such debt within the jurisdiction of the court . . . . enter a plaint to obtain payment to him of the amount of the debt due to the judgment debtor from the garnishee. . . . ."

By Rule 4, the summons upon such a plaint, when served, "shall attach in the hands of the garnishee all debts due, owing, or accruing from him to the judgment debtor."

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Holl, Q.C. (*R. V. Williams* with him), in support of the motion. The order for attachment cannot be supported, for the future unearned salary of the judgment debtor is neither a debt "owing" nor "accruing" within the meaning of the County Court Rules. There is no actual debt, but only a possible liability. If the judgment debtor, in the interval before the next monthly payment became due, were to absent himself from his duties, or be guilty of misconduct, the money would not be earned. *Jones* v. *Thompson* (1) is in point. There an order for the attachment, under the Common Law Procedure Act, 1854, of a sum of money for which the defendant had obtained a verdict against the garnishees in an action for unliquidated damages for breach of contract, was refused, Wightman, J., saying, "It appears to me that it is neither a debt owing nor accruing. The latter word can only be applied, in my opinion, to a debitum in præsenti solvendum in futuro. There must be a debt perfected in order to entitle a judgment creditor to the benefit of this clause": and Crompton, J. "In my opinion there must be a debt which, though not due in point of payment, is yet an absolute debt. There is a large class of cases which comes under this head, such as the case between the drawer and payee of a promissory note still running, in which I have always held at chambers, and I understand other judges also, that there is a debt. On the other hand, I have always held that it is not sufficient that in all probability there will be a debt, as in the cases of rent or annuities not yet due. The mere fact that it is most probable that there will be a debt is not sufficient. There must be an actual debt."

[COCKBURN, C.J. What inconvenience is there in attaching the future salary, except the risk that the order may be abortive?]

There is no power to make the order, except where a debt is actually due. The garnishee forms under the Common Law Procedure Act, 1854, where the proceeding is precisely similar to the present one, are not applicable to a salary which has not yet been fully earned, otherwise a conditional, instead of a final, order would be necessary. In the recent case of *Tapp* v. *Jones* (2), where an order attaching an accruing debt was upheld, it is quite evident that there was an actual debt due.

(1) E. B. & E. 63; 27 L. J. (Q.B.) 234. (2) Law Rep. 10 Q. B. 591.

No counsel appeared to oppose the motion.

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PER CURIAM (Cockburn, C.J., and Mellor, J.) We think that the future salary cannot be attached, and that the appeal against the order must be allowed. The case is governed by the opinion expressed by the Court in *Jones* v. *Thompson* (1), an opinion in which we entirely concur.

Rule absolute.

Solicitors for garnishees: *Van Sandau & Cumming, for Joseph Batley, Town Clerk, Huddersfield.*

THE LONDON TRAMWAYS COMPANY, LIMITED, APPELLANTS; BAILEY, RESPONDENT.

Nov. 28.

Tramway Company—Agreement with Conductor—Manager of Company sole Judge between Company and Conductor—Jurisdiction of Magistrate, how far affected.

The complainant became conductor of a tramway company under an agreement by which he was to pay them 5*l.*, to be retained, together with his wages for the current week, as security for the discharge of his duties and the observance of the rules of the company, &c.; the company to have power, in case of any breach by the conductor of the rules, to retain the 5*l.* and his wages for the current week as liquidated damages for such breach; and it was provided that "the manager of the company should be the sole judge between the company and the conductor whether the company was entitled to retain the whole or any part of the 5*l.* and wages for the current week as liquidated damages; and that the certificate should be binding and conclusive evidence in all courts of justice, civil and criminal, and before all stipendiary and police magistrates, &c., that the amount thereby certified as the amount to be retained was the true amount to be retained, and should bar the conductor of all right to recover it." The complainant having summoned the company before a police magistrate, under 6 & 7 Vict. c. 86, to recover his deposit and wages:—

Held, that the agreement was not illegal, and the complaint being substantially a civil proceeding, the manager's certificate that the deposit and wages had been forfeited was conclusive evidence of the fact, precluding the magistrate from making any further inquiry.

CASE stated by a metropolitan magistrate, under 20 & 21 Vict. c. 43.

On the 29th of June, 1877, a summons was issued from the Southwark Police Court, on the complaint of George Bailey,

(1) E. B. & E. 63; 27 L. J. (Q.B.) 234.

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herein called the complainant, to the London Tramways Company, herein called the defendants, under 6 & 7 Vict. c. 86, s. 22 (1), for the purpose of having determined by the magistrate what, if any, sum was due from the defendants to the complainant in the matter of his complaint.

A tramway car is a metropolitan stage carriage, and the complainant was a conductor in the service of the defendants. He was by them discharged on the 21st day of June after about three months' service. On entering the service he had received a copy of the company's rules, and had signed an agreement, copies of both of which accompanied the case (2), and had paid into the

(1) By 6 & 7 Vict. c. 86, s. 22, it shall be lawful for any justice of the peace to hear and determine all matters of complaint between any proprietor of a hackney carriage or metropolitan stage carriage, and the driver or conductor of the same respectively, and to order payment of any sum of money that shall appear to be due to either party for wages or for the earnings in respect of any such carriage, or on account of any deposit of money, and to order compensation to the proprietor in respect of damage or loss which shall have arisen through the neglect or default of any driver or conductor to the property of his employer intrusted to his care, or in respect of any sum of money which such proprietor may have been lawfully ordered by a justice of the peace to pay, and which has been actually paid pursuant to such order, on account of the negligence or wilful misconduct of his driver or conductor, and to order such compensation to either party in respect of any other matter of complaint between them as to such justice shall seem proper.

(2) By the second clause of the agreement between the company and the respondent, the contract of service and hiring might be terminated and the conductor discharged by the company on any day, and at any hour of any day, by a notice, either verbal or written, from the company or any manager—and without stating any cause of discharge.

By clause 5, "The conductor will, on the signing hereof, pay to the company 5*l.*, to be retained by the company, together with any such interest thereon as is hereinafter mentioned, and with all wages for the current week, as security for the due discharge of his duties as conductor, and for the due accounting for and paying over to the company all money received by him for or on behalf of the company, and for the due observance by him of the rules and regulations aforesaid, and all alterations thereof, for payment of all damages and loss occasioned to the company or their property, and all damages, fines, and penalties to which the company may become or be made liable by reason of anything wrongfully or negligently done, omitted, or suffered by the conductor, and for the payment of all moneys for which he is made responsible by any of the clauses of any of the said rules and regulations, or any alterations therein."

By clause 6, "In case of any breach by the conductor of any of the said rules and regulations, or any alterations therein, the company may retain the whole of the said 5*l.*, and any in-

defendants' hands the sum of 5*l.* as deposit under the fifth clause of the agreement. On the day of his discharge, besides this deposit money, there had accrued as wages due to him the further sum of 25*s.* This entire sum of 6*l.* 5*s.* the manager of the company declared forfeit to the defendants (clause 6 of the agreement), and informed the complainant that he was discharged for omitting duly to punch or register fares received by him from passengers, in violation of rule 157. The manager refused to inform the complainant on what information he grounded his charge, or in any way to support it.

At the hearing before the magistrate the complainant denied on oath that he had ever omitted to punch or register the fares, or in any way violated the company's rules. He further swore that although the agreement had been read over to him, it had been

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terest thereon, and the conductor's wages for the current week, as liquidated damages for such breach. In any other case the amount for the payment or satisfaction of which the said 5*l.* and any interest thereon, and the conductor's wages for the current week, are hereby made a security, may also be retained out of the same sum, and interest and wages, by the company as liquidated damages.

By clause 7, "The manager of the company shall be the sole judge between the company and the conductor whether the company is entitled to retain the whole or any part of the said 5*l.*, and interest and wages for the current week, as liquidated damages. And his certificate in writing, that the same or any given part thereof stated in such certificate are to be so retained, and of the cause of such retention, shall be binding and conclusive evidence between the parties in all courts of justice, civil and criminal, and before all stipendiary and police magistrates and justices of the peace, both that the amount thereby certified as the amount to be retained is the true amount to be retained, and has become and is liable to be so retained by the company, and that that has happened which in such certificate is certified to be the cause, and that it is a lawful and sufficient cause for such retention, and such certificate shall bar the conductor of all right under any circumstances to recover the moneys so certified to be retained, or any part thereof."

By the 157th rule of the "Rules and Regulations for the Officers and Servants of the London Tramways Company," it is provided that on receiving fares of certain rates the conductor must, before collecting any other fare, and in the immediate view of the party paying, punch from a single journey ticket for the rate of fare received.

By rule 174, a breach by any conductor of any rules will ensure his instant dismissal and the retention by the company of all money held by the company as security, according to the agreement.

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read so fast that he did not understand its full force and effect at the time of signing it.

For the defendants no evidence at all was offered. They put in at the opening of the case and entirely relied on the certificate (1) bearing their manager's signature, objected to the magistrate receiving any evidence outside of it, and urged that he was precluded from deciding the case otherwise than in accordance with clause 7 of the agreement.

The magistrate was of opinion that it was not competent to the parties, by contracting themselves out of the provisions of an Act of Parliament, to preclude a justice of the peace from exercising the full jurisdiction therein conferred upon him, and that he ought not to be bound by the contract, which seemed to him to be opposed to the general policy and intent of the statute, and therefore illegal and invalid. He accordingly declined to accept the certificate as evidence of the facts therein stated.

He also considered the agreement unreasonable and inequitable, and that the possible operation of it had not been fully understood by the complainant, and accordingly ordered the defendants to pay the sum claimed, with costs.

Kemp, Q.C. (*Humphreys* with him), for the appellants. The magistrate was wrong. Under the agreement in question, the certificate of the manager is conclusive as to the right of the company to keep back as damages part of the conductor's wages. It is no more unreasonable than the provision as to the architect's certificate in the ordinary building contract. The agreement cannot be said to oust the magistrate of his jurisdiction; it merely provides that until a third person has decided upon any difference between the parties, there shall be no remedy in a court of law, a provision which, ever since *Scott* v. *Avery* (2), has been considered legal. The

(1) This certificate was to the effect that the company was entitled to retain as damages the 5*l.* paid by the complainant to the company, and 1*l.* 5*s.*, the amount of his wages for the current week, and that the cause of such retention was that he had committed a breach of the rules and regulations mentioned in the agreement by receiving from passengers their fares and not punching from single journey tickets for the rate of fares received the figures denoting such fares.

(2) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

complaint before the magistrate is a civil, not a criminal proceeding. As to the objection that the defendant never understood the meaning of the agreement, it is not suggested that he was unable to read, and he cannot take advantage of his own negligence in not paying proper attention to that which he signed.

Wildey Wright, (*Safford* with him), for the respondent. The agreement ought not to bind the respondent, for it is an attempt to prevent him from proving the real facts of the case in a proceeding before a magistrate.

[LUSH, J. If this certificate had been put in evidence at the trial of an indictment for embezzlement, I think it ought not to have been taken as conclusive proof; but the proceeding before the magistrate is much the same as if an action had been brought.]

Even in civil proceedings the Courts have always been unwilling to allow one of the parties to an agreement to be deprived of his rights by a stipulation like the present one: *Scott* v. *Avery* (1); *Brown* v. *Overbury*. (2)

MELLOR, J. Our judgment must be for the appellants. In the first place, it must be taken that the man could read and write, and we cannot listen to his statement that he never understood what he was signing, as, for anything that appears, he had every opportunity of making himself acquainted with it. The next objection is that the provision making the certificate conclusive is an attempt to deprive the magistrate of his jurisdiction. But this is not so. If two persons choose to agree that neither of them shall have any right of action under an agreement until a third person has given his decision upon the matter in question, as in the case of a wager, &c., the agreement is binding. It is quite reasonable that people should endeavour as far as possible to avoid the necessity of having recourse to courts of law. The present agreement is very like the stipulation that the certificate of an architect or engineer shall be conclusive; the only difference is that, with regard to the 5*l.* claimed by the conductor, the company have the further security of the money being kept with them as a deposit. Making the manager sole judge of what is due

(1) 5 H. L. C. 811; 25 L. J. (Ex.) 308.

(2) 11 Ex. Rep. 715; 25 L. J. (N.S.) (Ex.) 169.

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from the company is not contrary to the policy of the law, and if the parties choose to make an agreement containing such a provision, they must be bound by it.

LUSH, J. I am entirely of the same opinion. We are called upon to interpret this agreement in the same manner as if the complainant had brought an action upon it instead of going before a magistrate, and we have only to inquire what was the bargain which the parties made. There can be no doubt that the complainant signed the agreement, and probably had a copy of it in his possession, so that he had every opportunity of reading and understanding it. Secondly, it cannot be denied that, under the agreement, he has consented to submit entirely to the rules of the company. It has been said that this clause is harsh and unjust, but it was a matter for his consideration before he gave his consent. In the case of building contracts, I have often been surprised that as regards extras the builder should agree to be wholly bound by the certificate of an architect retained by his employer. But this is every-day practice, and I see no greater injustice in the present case. Though made before a police magistrate, the complaint is practically a civil proceeding.

Judgment for the appellants.

Solicitor for appellants: *H. C. Godfray.*
Solicitor for respondent: *T. J. Moss.*

STRAKER *v.* KIDD & CO.

PORTEUS AND OTHERS *v.* WATNEY AND ANOTHER.

1878
March 8.

Ship and Shipping—Demurrage—Bill of Lading—Charterparty—Consignee prevented from clearing Ship by the Default of other Consignees.

A cargo of wheat was shipped on board the plaintiff's ship under eight bills of lading which contained the following clause:—"Three working days to discharge the whole cargo or 30*l.* sterling per day demurrage." The defendants, the indorsees of one of the bills of lading, were prevented from completely unloading their portion of the cargo within the lay days, because it lay at the bottom of the hold under the portions of cargo belonging to the other consignees, and such other portions of the cargo were not unloaded in time to enable the defendants to clear the ship of their portion within the lay days. The master was ready and willing to discharge the defendants' portion of the cargo as soon as it could be reached, and the defendants to receive the same, and the discharge of it in due time was only prevented by the before-mentioned circumstances:—

Held, that under the above-mentioned stipulation of the bill of lading the consignee, as between himself and the shipowner, undertook to bear the risk of being prevented from discharging his portion of cargo from the ship within the lay days by the default of his fellow consignees, and the defendants were therefore liable for demurrage.

In a second case the charterparty under which the ship was chartered stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at 35*l.* day by day. The bills of lading, one of which, for a part of the cargo, had been indorsed to the defendants, contained the words, "paying freight for the same goods and all other conditions as per charterparty." In other respects the facts were precisely similar to those of the first case:—

Held, that the defendants were liable for demurrage.

Affirmed in appeal 4 Q.B.D. 160 C.A.

THESE were cases reserved by Lush, J., from sittings at Nisi Prius n London for further consideration.

The nature of the actions, the facts of the cases, and the arguments sufficiently appear from the judgments.

In the first case *Russell, Q.C.*, and *McLeod* appeared for the plaintiff.

Watkin Williams, Q.C., and *J. C. Mathew*, for the defendants.

In the second case *A. L. Smith* and *R. T. Reid* appeared for the plaintiffs.

Butt, Q.C., and *J. C. Mathew*, for the defendants.

Cur. adv. vult.

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STRAKER v. KIDD.

On the 8th of March the following judgments were delivered :—

STRAKER *v.* KIDD & CO.

LUSH, J. This is an action for two days' demurrage of the steamer *Charles Mitchell*, which had been chartered by Messrs. Gibsone & Co. for the conveyance of a cargo of wheat from Dantzic to London. Eight bills of lading were given by the master for various portions of the wheat shipped by the charterers, one of which had been indorsed to the defendants. Each of them contained the following clause :—"Three working days to discharge the whole cargo, or 30*l.* sterling per day demurrage." The vessel arrived on the morning of the 23rd of May, was reported at the Custom House at eleven o'clock, and was ready to discharge at noon of the same day. None of the consignees, however, were ready to receive delivery on that day, and the discharge did not commence till the morning of the 24th.

One question raised at the trial was, whether the lay days commenced at noon of the 23rd or on the following day. In the view which I take of the contract it becomes immaterial to decide this question.

It happened that the defendants' portion of the cargo, except a comparatively small quantity which lay in the bunker and upon which no question arises, was part of a larger bulk stowed at the bottom of the hold, which belonged to the defendants and to another consignee in given proportions. This bulk was not reached till between two and three o'clock on Saturday the 26th. The barges of the other consignee being alongside first, his portion of the bulk was first delivered, and the defendants, though their barges had been in readiness the whole day, were unable to get any part of their cargo till after five o'clock. The discharge was, therefore, only commenced that afternoon, and was not completed till the Monday, whereby the vessel lost two days' sail.

The defendants contended that as they could not get their goods in time to clear the ship on that day, they were entitled to a reasonable time on the Monday to complete; that the default, if any, was that of the master, who was unable, and therefore was not ready, to deliver in time to enable them to discharge the ship within the lay days.

On the other hand it was argued that the plaintiffs were always ready and willing to discharge the cargo, and that the risk of being prevented from getting their goods by the delay of other consignees is a risk which falls on the consignees and not on the shipowner.

The first question is, what is the contract which is implied by the acceptance of a bill of lading containing the stipulation in question. It cannot be said that the words have no meaning, or that they were not intended to be binding to some extent. For the obvious purpose of the shipowner in inserting them was to secure the payment of a stipulated sum per day for demurrage, in case his ship should be detained in the process of unloading beyond three days, and the only meaning of which the words are fairly capable is, that if the whole cargo is not discharged within three days, demurrage at the rate of 30*l.* per day shall be paid. This is the alternative which the bill of lading presents, and which the consignee impliedly agrees to by taking the benefit of it.

The objection raised against this rendering of the clause is undoubtedly striking. It virtually makes each holder of such a bill of lading answerable for the others as well as for himself, though he has no control over their acts. But no other construction can be put upon the clause, without doing violence to the words or introducing a qualification which destroys their force. If the words had been, as the defendants contend they should be read, "Three days to discharge the goods in this bill of lading or demurrage," the defendants would have been in no better position; for the words must have been construed as an absolute contract to clear the goods within that time. The argument on the part of the defendants requires the insertion of a proviso, making the liability to demurrage conditional on their not being delayed by the acts or defaults of the other consignees. That would make it an entirely different contract, and defeat the obvious intention of the shipowner, which was to put pressure upon all the consignees, and make it the interest of all of them to clear the ship within the stipulated period, under the penalty of their having to pay 30*l.* per day, leaving it to them to settle between themselves how, by whom, and in what proportions the demurrage account should be paid.

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It seems to me, therefore, impossible to construe this clause otherwise than as a contract to pay the stipulated demurrage if the ship is not cleared within three days.

There is, of course, an implied condition that the shipowner shall be ready and willing to deliver. If he wrongfully refuses to give over the goods, or if by reason of any default of his or of any obstacle for which he is responsible the consignee is unable to get his goods, this would afford a good answer to the claim, and this is the substance of the defence which is pleaded.

Now, the only thing which prevented the delivery in the present case was the inability of the master to get at the goods, because they were stowed at the bottom of the hold, and because the owners of the superincumbent goods had neglected to take those goods away in proper time. Can this neglect of the other consignees be said to be the default of the master? If not, it is immaterial whose fault it was; for the defendants undertook that, whether they were able to get away their goods or not, they would pay demurrage if the ship was not cleared within the stipulated period, the contract being, as I have said, an absolute and not a conditional contract. The defendants are therefore liable, unless they can shew that some act or default of the owner, or of some one for whom he is responsible, prevented them from performing their contract. Now, it is clear that the master was not in default, he was ready and anxious to deliver. The leaving those goods in the ship which overlaid the defendants' goods was not his act, but was the act of third persons, not with his consent, but against his will. The case therefore falls within the principle laid down in *Thiis* v. *Byers* (1), and the cases there cited, that when the vessel has arrived at the place of discharge, and the master is ready to commence and complete the delivery, the lay days begin to run, and the consignee must bear the risk of any ordinary casualty or obstruction which might occur to interrupt the process of discharge. The cases on this particular point are but few, and they are conflicting. In *Leer* v. *Yates* (2), the Court of Common Pleas held, after taking time to consider, under a similar bill of lading that the consignee was liable for demurrage, though he was prevented from getting his goods by the delay of other consignees

(1) 1 Q. B. D. 244. (2) 3 Taunt. 387.

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whose goods lay above his. But Lord Tenterden, in two subsequent cases, *Rogers* v. *Hunter* (1) and *Dobson* v. *Droop* (2), dissented from this doctrine, and directed the jury in a similar case that if a consignee cannot get his goods because some other person's goods prevented him, he is not liable for the detention of the vessel. I do not find that this ruling was questioned by motion to the Court, nor do I find any subsequent decision on the point. *Leer* v. *Yates* (3) has, however, been repeatedly quoted as an authority, and is, I think, upon principle, a sound decision. Lord Tenterden's dictum describes the position of a consignee whose bill of lading mentions no specific time for unloading, but it overlooks the nature and effect of such a stipulation as was contained in the bill of lading in those cases, and as is contained in the bill of lading now in question. My judgment is, therefore, for the plaintiff for two days' demurrage at 30*l.* per day, and costs.

Judgment for the plaintiff.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *Stocken & Jupp.*

PORTEUS AND OTHERS *v.* WATNEY AND ANOTHER.

PORTEOUS v. WATNEY.

LUSH, J. The circumstances under which the defendants in this case are sought to be made liable to demurrage are precisely the same as those in *Straker* v. *Kidd & Co.* The only distinction between the two cases is in the form of the bill of lading. In the present case the ship was chartered to convey a cargo of grain from Cronstadt to this country, and to be delivered here as directed by bills of lading. The charter stipulates that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at 35*l.* day by day.

The bills of lading, one of which for a part of the cargo was indorsed to the defendants, contained the words "paying freight for the same goods and all other conditions as per charterparty." Seven days had been consumed at the port of loading, so that seven working days remained for unloading at the port of dis-

(1) M. & M. 63. (2) M. & M. 441.
(3) 3 Taunt. 387.

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charge. It was argued that the words of reference in the bill of lading import into it only so much of the stipulation in the charter-party as applies to these particular goods, that is, that it gives the consignee such a proportion of the seven days for discharging them as his part of the cargo bears to the whole. But this is not the natural meaning of the words, nor can it have been the intention of either party.

The object of the shipowner obviously was to place the consignees under the same obligation as to payment of demurrage as the charter imposed on the charterer, and any consignee knows before he reads the charter that if lay days are provided for they are given for discharging the whole cargo. The bill of lading must therefore be read as if instead of the words referring to the charterparty it had contained the entire stipulation, expanded so as to be adapted to the facts. "Seven working days are to be allowed for unloading the ship at the port of discharge, and ten days on demurrage at 35*l.* day by day." This puts the present case exactly on a parallel with that of *Straker* v. *Kidd & Co.*, and I therefore, for the reasons given in the judgment in that case, hold that the defendants are liable for the three days' demurrage claimed by the writ, making 105*l.*, and give judgment accordingly with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *Plews, Irvine, & Hodges.*

LESLIE AND OTHERS, APPELLANTS; FITZPATRICK, RESPONDENT. 1877 *Dec.* 1.

Infant—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 4—*Validity of Agreement—Power of Employer to terminate Contract.*

Under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), which enables a dispute between an employer and workman to be heard and determined by a court of summary jurisdiction, an agreement, by which an infant undertakes to serve an iron shipbuilder and boilermaker as plater and rivetter for a term of five years at weekly wages, with a proviso that—should the employers cease to carry on their business, or find it necessary to reduce the operations of their works, either temporarily or permanently, from their being unable to obtain materials, or in consequence of any accident, or in consequence of strikes or combinations of workmen, or from any cause over which they should not have any control—they shall have power to terminate the agreement, and discharge the infant upon giving him fourteen days' notice, is not void on the face of it so as to prevent it from being enforced against him according to the Act; the question, whether the provision is or is not inequitable as regards the infant, depending upon whether it was at the time of the agreement common to labour contracts, or was in the then condition of trade such as the master was reasonably justified in imposing as protection to himself, and also upon whether the wages were a fair compensation for the services of the infant.

CASE stated by justices under 20 & 21 Vict. c. 43.

On the 25th of May, 1877, the appellants entered a plaint under the Employers and Workmen Act, 1875 (1), against the respondent, an infant, for 1*l.* 12*s.* damages for breach of contract for loss of his services under a contract dated the 15th of November, 1876, which was put in and proved by the appellants. The contract was in the words following:—

"Memorandum of agreement, entered into this 10th of November, 1876, between Andrew Leslie, Arthur Coote, and Joseph Henderson, of Hebburn, in the county of Durham, iron shipbuilders, boiler makers, and general blacksmiths, carrying on business under the name or firm of Andrew Leslie & Co. of the one part, and John Fitzpatrick, of Hebburn, aforesaid, of the

(1) By the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4, a dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purposes of this Act, shall be deemed to be a court of civil jurisdiction, and in a proceeding in relation to any such dispute the Court may order payment of any sum which it may find to be due as wages or damages, or otherwise, &c. . . .

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other part. The said John Fitzpatrick, in consideration of the said Andrew Leslie, Arthur Coote, and Joseph Henderson agreeing to employ him on the terms and subject to the proviso hereinafter mentioned, agrees with the said Andrew Leslie, Arthur Coote, and Joseph Henderson, to faithfully serve them as plater and rivetter, and general assistant, for the space of five years from the 10th of November, 1876, and to abide by and conform to the rules and regulations for the time being of the said Andrew Leslie, Arthur Coote, and Joseph Henderson, in force for regulating the conduct of those working in their employment; and the said Andrew Leslie, Arthur Coote, and Joseph Henderson, on their part, in consideration of his agreeing to serve as hereinbefore mentioned, agree with him that they shall, subject to the conditions contained in the proviso hereinafter mentioned, employ the said John Fitzpatrick, and pay him fortnightly for the work and services which shall have been actually performed and rendered for the said Andrew Leslie, Arthur Coote, and Joseph Henderson, at the following rates of wages, that is to say, 9*s.* per week during the first year of service, and 10*s.* per week during the second year of service, and 11*s.* per week during the third year of service, and 13*s.* per week during the fourth year of service, and 16*s.* per week during the fifth year of service. Provided always, and it is hereby further agreed by and between the said parties hereto, that should the said Andrew Leslie, Arthur Coote, and Joseph Henderson cease to carry on their said business, or find it necessary to reduce the operations of their works either temporarily or permanently, from their being unable to obtain materials, or in consequence of any accident, or in consequence of strikes or combination of workmen, or from any cause over which they shall not have any control, the said Andrew Leslie, Arthur Coote, and Joseph Henderson shall be at liberty and have power, on their giving to the said John Fitzpatrick fourteen days' notice of their intention so to do, to terminate and put an end to this agreement, and to discharge the said John Fitzpatrick from their service, and the said service shall thereupon determine."

The justices considered the contract could not be enforced against the respondent, an infant, inasmuch as it contained a very

stringent provision for the master's exclusive benefit, enabling them under various circumstances to determine the contract and liability to pay the infant his wages; accordingly, acting upon the authority of *Reg.* v. *Lord* (1), they dismissed the complaint.

If the Court should be of opinion that the contract was binding upon the respondent, the case was to be remitted back to the justices in order that judgment might be given for the appellants.

J. Edge, for the appellants. There is nothing upon the face of this agreement to make it unreasonable or invalid. In *Reg.* v. *Lord* (1) the agreement was of a wholly different character, for while it bound the infant to serve during the whole term it practically enabled the employer to stop his works and the wages of the infant when he pleased. The present contract, which requires the infant to serve for a term at fixed wages, is for anything that appears to the contrary, beneficial to him, and it is not unreasonable that the employer should have power to determine it. The authorities upon the subject are collected in *Cooper* v. *Simmons* (2), where it is said by Wilde, B.: "A contract is not binding on an infant if it is manifestly to his prejudice, or at least so plainly that the Court can say it is to his prejudice."

No counsel appeared for the respondent.

Cur. adv. vult.

Dec. 1. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J. We are of opinion that this case must be remitted to the justices for their further consideration.

The agreement in question is not open to the objections which were held to be fatal in *Reg.* v. *Lord.* (1) According to the construction put upon the contract in that case, it bound the infant not to engage in any other service or business during the whole term, while it reserved to the master the right to stop the work *and the wages* whenever he pleased. Moreover, it rendered the infant liable to be dismissed for any misconduct or disobedience, and upon dismissal to forfeit all his wages which should then be due and unpaid. That contract was manifestly void on the face

(1) 12 Q. B. 757; 17 L. J. (M.C.) 181.

(2) 7 H. & N. 707; 31 L. J. (M.C.) 138.

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of it. Either stipulation was of itself sufficient to invalidate it. The first was inequitable, the second violated a settled rule of law, by which an infant is incapable of contracting himself out of his acquired rights, or subjecting himself to a penalty.

No such objection is apparent on the face of the agreement which we are dealing with. Its unilateral provisions, which the justices considered unfair, do not necessarily make it so. Whether they are inequitable or not depends on considerations outside the contract. If such provisions were at the time common to labour contracts, or were in the then condition of trade such as the master was reasonably justified in imposing as a just measure of protection to himself, and if the wages were a fair compensation for the services of the youth, the contract is binding, inasmuch as it was beneficial to him by securing to him permanent employment, and the means of maintaining himself. If on the other hand advantage was taken of him to exact conditions which were unusual and unreasonable, or to secure his services for wages which were unreasonably low and inadequate, the infant is not bound. This is the question arising on this agreement, and the one which the justices have to decide.

Case remitted.

Solicitors for appellants: *John Scaife, agent for Duncan & Duncan, South Shields.*

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Jan. 24.

PARISH OF GREAT YARMOUTH, APPELLANTS; CLERK OF THE PEACE OF THE CITY OF LONDON, RESPONDENT.

Poor Law—Divided Parishes Act (39 & 40 *Vict. c.* 61), *s.* 35—*Abolition of Derivative Settlements—Child under Sixteen—Husband and Wife.*

By 39 & 40 Vict. c. 61, s. 35, no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another . . . . If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have acquired a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into

the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born :—

Held, that the wife of a man who had, while under the age of sixteen and before the passing of the Act, derived a settlement from his father, took this derivative settlement of her husband, and not his birth settlement; for the settlement which a son while under the age of sixteen derives from his father is excluded from the operation of the section so far as it abolishes derivative settlements.

CASE stated under 12 & 13 Vict. c. 45, s. 11.

1. On the 5th of February, 1877, Hannah Louisa Fisk was indicted at the Central Criminal Court for the wilful murder of James Day.

2. Upon her being arraigned evidence was given of insanity, and she was found by the jury not to be in a fit state of mind to plead to the indictment, whereupon the Court ordered her to be kept in strict custody until her Majesty's pleasure should be known.

3. On the 8th of December, 1872, the said Hannah Louisa Fisk, then Hannah Louisa Day (spinster), married James Fisk.

4. James Fisk was born on the 9th of December, 1843, at Great Yarmouth, in the appellants' parish, and is the son of George and Mary Fisk, but the said James Fisk never acquired a legal settlement in his own right.

5. A few weeks after the birth of James Fisk his parents, George and Mary Fisk, taking him with them, went to reside in the parish of Gorleston, in the county of Suffolk.

6. George and Mary Fisk, with their son James Fisk, continued to reside in that parish until Michaelmas, 1859, when they returned to Great Yarmouth.

7. During his residence in the parish of Gorleston, and before the said James Fisk was sixteen years of age, the said George Fisk acquired a settlement in Gorleston parish, and did not before the said James Fisk attained the age of sixteen years acquire any subsequent legal settlement.

8. James Fisk was not emancipated until about two months after George Fisk returned to Great Yarmouth in 1859, when he attained the age of sixteen years, and he has never acquired an independent settlement, nor has his wife, the said Hannah Louisa Fisk, ever acquired a settlement in her own right.

9. On the 15th of February, 1877, Hannah Louisa Fisk was in

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custody by order of the Court as aforesaid in the gaol of Newgate, which is in the city of London.

10. On the 15th of February, 1877, two justices of the city of London, by authority of the 7th section of 3 & 4 Vict. c. 54, made an order by which they adjudged Hannah Louisa Fisk to be legally settled in the parish of Great Yarmouth, on the ground that her husband was born in Great Yarmouth, and directed the appellants, the guardians of the poor of that parish, to pay weekly to the superintendent of the Broadmoor Lunatic Asylum, to which she was about to be removed, the sum of 14*s*.

13. The opinion of this Court is sought as to whether the order was rightly made upon the parish of Great Yarmouth.

Besley (*Poyser* with him), for the appellants. It will be conceded that Hannah Fisk's settlement was the settlement of James Fisk, her husband. Then James Fisk took his father's settlement, as he never acquired any settlement apart and distinct from it. The Divided Parishes and Poor Law Amendment Act, 1876 (1), abolishing, with some exceptions, derivative settlements, is not retrospective in its operation, but if it were, it provides that a child up to sixteen years of age shall take the settlement of his father, which in this case was not in the appellant parish. [He was then stopped.]

Poland (*Mead* with him), for the respondents. The settlement of the pauper's husband was his birth settlement in the appellant parish. The object of the Act 39 & 40 Vict. c. 61, s. 35, was to abolish derivative settlements, and not to go back further than that of the parent or head of the family. But if the pauper takes the

(1) By the Divided Parishes Act (39 & 40 Vict. c. 61), s. 35, "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another . . . . If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have acquired a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

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settlement of her husband's father, the result will be that her children, if she has any, cannot take this settlement which is their parent's derivative settlement, thus separating parents and children, which is contrary to the policy of the Act.

[COCKBURN, C.J. We are not now inquiring into the derivative settlement of the parents of James Fisk.]

When a man has married and become the head of the family, it was not meant to go back further than his own settlement, otherwise the children of James Fisk, the pauper's husband, who according to the Act, take their birth settlement, will have a different settlement from that which he has, and will be removable to another parish.

PER CURIAM (COCKBURN, C.J., and MANISTY, J.) The words of the section are clear. A child under sixteen is within the exception. The pauper's husband, therefore, took the settlement of his father.

Judgment for the appellants.

Solicitor for appellants: *A. H. Barnard.*

Solicitor for respondents: *Nelson.*

ROSE & CO. *v.* GARDDEN LODGE COAL AND COKE COMPANY, LIMITED.

Feb. 14.

Company—Voluntary Winding-up—Stay of Proceedings in Action—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 85, 138—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 5.

Upon an application to stay an action brought against a company which was being voluntarily wound up, it appeared that the plaintiff had gone on with the action after notice of the winding up and an offer from the company to allow him to prove against the estate for his debt and costs, if he would undertake not to proceed further:—

Held, that on making the order to stay proceedings the plaintiff could not be allowed to add to his debt his costs of appearing upon the application.

ACTION for the price of goods sold and delivered to the defendant company.

After the goods had been supplied by the plaintiffs, a resolution to wind up the defendant company voluntarily was passed and a

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liquidator appointed, and on the 6th of November, some time after the commencement of the action, a letter was written to the plaintiffs by the defendants' solicitor informing them that an application would be made to the Court to restrain further proceedings, and that the plaintiffs were at liberty to prove against the estate for their debts and costs if they would undertake not to proceed further.

Medd, for the liquidator, moved to stay the proceedings. In *Walker* v. *Banagher Distillery Co.* (1) a similar application was granted. The practice in Chancery has been to stay the proceedings on the terms of the plaintiff being at liberty to add the costs of the action already incurred to his debt. Here, however, the plaintiffs have unnecessarily and vexatiously continued the proceedings, and ought to be ordered to pay the costs of this application.

Edwyn Jones, for the plaintiffs.

PER CURIAM (Cockburn, C.J., and Mellor, J.) There must be an order to stay the proceedings. We do not on this occasion make the plaintiffs pay the costs of the application, but they cannot be allowed to add their costs of appearing upon this application to the debt to be proved by them under the liquidation.

Order accordingly.

Solicitors for plaintiffs: *Mackrell & Co.*
Solicitors for defendants: *R. W. Marsland.*

(1) 1 Q. B. D. 129.

[IN THE COURT OF APPEAL.]

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Libel—Privileged Communication—Malice in fact—Evidence of express Malice.

In an action for libel where the occasion is privileged, it is for the plaintiff to establish that the statements complained of were made from an indirect motive, such as anger, or with a knowledge that they were untrue, or without caring whether they were true or false, and not for the reason which would otherwise render them privileged; and if the defendant made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable grounds for his belief.

11 QBD 598

APPEAL from the judgment of the Queen's Bench Division discharging an order obtained by the defendant for a new trial.

Claim alleged that the plaintiff was a clergyman, and was acting as curate in charge at Creeting, Needham Market, for stipend; that he had before been curate at Horringer, near Bury, and had also been curate in charge of Assington, of which parish the Rev. H. L. Maud was vicar, and had applied to Canon Sparke and been accepted by him to take charge as his curate for a permanency of the parish of Feltwell for stipend. Shortly before the publishing of the letter hereinafter mentioned, one Canham had reported to H. L. Maud that James Oakes had stated to Bevan and his son that he had seen a letter written by the plaintiff, in which he owned that he had seduced two girls during his residence at Horringer. On the 2nd of May, 1876, the defendant falsely and maliciously wrote and published of the plaintiff a letter addressed to H. L. Maud in the terms following: "The facts as I have them are these. If you had been at home I should at once have communicated them to you. Mr. N. Clark" (meaning the plaintiff) "was a candidate for the vicarage of All Saints. Mr. H. Pratt, being much interested in this, was anxious to learn particulars about him, and knowing that he had been curate at Horringer, in the neighbourhood of Bury and near to Mr. Bevan's place, he requested Mr. Bevan to make some inquiries about him. The result of this was, amongst other things, that Mr. James Oakes assured him that he had seen a letter containing the matter reported to you by Mr. Canham" (meaning that the plaintiff

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while curate of Horringer seduced two girls), "Mr. Gascoigne Bevan was with his father in Mr. Henry Oakes' dining-room when Mr. James Oakes" (Henry Oakes' brother) "gave the information. At the time Henry Oakes stated that Mr. N. Clark had been expelled from the army for cheating at cards, had led a profligate life at Cambridge, &c. Mr. Gascoigne is quite willing to tell you all he knows, and to write for further information to Mr. Oakes." The claim also alleged that the defendant had maliciously spoken and published of the plaintiff, &c., the following words: "Mr. James Oakes told Mr. Bevan and his son that he had seen a letter of Mr. N. Clark in which he owned that while at Horringer he had seduced two girls." "While he was curate at Horringer he seduced two girls." "Mr. Henry Oakes had stated that he" (the plaintiff) "was expelled from the army for cheating at cards, and had led a profligate life at Cambridge:" alleging as special damage that Canon Sparke refused to employ him as curate.

Defence: a denial of all the material allegations, and that the causes of action were for words written and spoken without malice, and under circumstances which constituted the same privileged communications.

Issue thereon.

At the trial before Huddleston, B., at the Suffolk Summer Assizes, 1876, the following facts were proved: The plaintiff had been the curate in charge of the parish of Assington, near Sudbury, the vicar, the Rev. H. L. Maud, being absent on the Continent. The Rev. C. Smith was the vicar of the adjoining parish of Newton, at whose church the plaintiff was to preach one of eight Lenten sermons, Mr. Green, Mr. Smith, the son of C. Smith, and other gentlemen having undertaken to preach on certain other days. One Gascoigne Bevan, a banker at Sudbury, meeting the defendant at the Sudbury bank, said to him, "I wished to see you on account of a notice I have seen in the *Free Press*, in which the Rev. Nassau Clark's name is advertised to preach a Lenten sermon for Mr. Smith. I had to make inquiries about Mr. Clark in reference to the living of All Saints. The inquiries I made were from H. Oakes, and the result of them was very much to this man's discredit, so much so that seeing his name advertised to preach for Mr. Smith, who was a very old friend of my father and

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mother, and also a most intimate friend of yours, I think it right to communicate these inquiries to you to do what you please with them. H. Oakes has told me that Mr. Clark had left the army through some trouble at cards, and also had led an irregular life while preparing for his ordination; and that James Oakes had stated that he had seen a letter written by Mr. Clark, in which he (Clark) said that he had seduced two girls while at Horringer." The defendant, bonâ fide believing the report on the respectability of his informant, went that same day to C. Smith's house, but C. Smith being unwell he communicated what he had heard to Mr. C. Smith's son in order that he might tell Mr. C. Smith. The defendant also informed his curate, Mr. Green, of the statement made to him by Mr. G. Bevan, in order to consult with him and take his advice on the matter; and he also afterwards communicated with Mr. Martin, the rural dean, with a view of consulting him as to whether he should inform the bishop of the diocese or Mr. Maud of the facts mentioned to him. The rural dean recommended the latter course, and the defendant afterwards meeting with Mr. Canham, Mr. Maud's solicitor, informed him of what he had heard, and asked him to write to Mr. Maud. Mr. Canham replied that Mr. Maud would shortly return to England, when he would mention the statements to him. Mr. Canham informed Mr. Maud of the statements, and Mr. Maud wrote to the defendant for further information; the defendant replied by the letter set out in the statement of claim. The defendant was not acquainted with the plaintiff, and had never had any communication with him.

At the close of the case the learned judge ruled that the letter of the 2nd of May and statements made by the defendant to Mr. Clark, Mr. Green, and Mr. Martin, were privileged communications, and he left the question of malice to the jury in these terms: "Now in law if a man writes or says what is not true and what is libellous or slanderous of another, it is presumed to be malicious: but when the occasion is privileged then you require something more, you require what the law calls express malice. I must tell you what express malice means; it does not mean that hatred and uncharitableness which are usually associated with the word malice. Malice in law means this—a

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wrongful act done intentionally without just cause or excuse, that is what malice means. I cannot put it better than in the way it is put here. [The learned judge read the definition of malice in law given by Bayley, J., in his judgment in *Bromage* v. *Prosser*. (1)] When you come to look at the word malice you will have to interpret it in this way: was there an intentional act on the part of the defendant, without just cause or excuse, in spreading those reports of the plaintiff? You have also to consider that to excuse him it must be done bonâ fide, and in the honest belief that what he wrote and said of the plaintiff was true, and the question I shall leave to you is this: did the defendant write the letter of the 2nd of May and make the statements he did bonâ fide, and in the honest belief that what he wrote and said with reference to the plaintiff was true, or was he actuated by feelings of malice? . . . What you have to do is to look at all the circumstances of the case and consider what is proved here; was this done recklessly; were these statements made without due or proper inquiry; was this a course of conduct adopted that we, as men of the world, would expect to be adopted? If you can answer these questions satisfactorily, then you will say that the defendant acted bonâ fide and in the honest belief that what he stated was true: but if you think that you would not have acted in that way, and that there was a carelessness or recklessness and disregard for the feelings of others, a disregard of that sort of duty which one man owes to another, then you will say that this was not done bonâ fide in the honest belief that it was true. . . . You, Mr. Molyneux, may defend yourself by the fact that these occasions were privileged, but to do so you must satisfy a jury that what you did you did bonâ fide and in the honest belief that you were making statements which were true. . . . What you have to consider is this: assuming that these occasions were privileged, do you think that the defendant made these statements and wrote this letter bonâ fide and in the honest belief that they were true, not merely that he believed them himself, but honestly believed them—which means that he had good ground for believing them—to be true? I mean to say that if he pertinaciously and obstinately, perhaps, persuaded himself of a matter for which persua-

(1) 4 B. & C. at p. 255.

sion he had no reasonable ground, and with respect to which persuasion you twelve gentlemen would say he was perfectly unjustified. . . . then your verdict will be for the plaintiff."

The jury found a verdict for the plaintiff for 200*l.*

At the November Sittings, 1876, the defendant obtained an order calling on the plaintiff to shew cause why there should not be a new trial, on the ground that the verdict was against the weight of evidence, and on the ground of misdirection of the learned judge, in that he misdirected the jury on the question of bona fides and malice, in telling them that if they thought the defendant published the defamatory matter complained of carelessly and recklessly, or with a disregard of the feelings of others, and in such a way as, being men of the world they would not have acted, they should find that the matter was not published bonâ fide.

At the Easter Sittings, 1877, after argument before Cockburn, C.J., and Mellor, J., the order was discharged.

The defendant appealed.

Dec. 1. *Willis, Q.C.*, and *Anderson*, for the defendant. The judge rightly ruled that all the statements were privileged: *Harrison* v. *Bush* (1); and the question of express malice was left to the jury; but the judge was mistaken in ruling that the protection of privilege was taken away if the statements were made recklessly and without due and proper inquiry, and if the conduct of the defendant was such as the jury as men of the world would not expect to be adopted. The direction should have been, however reckless the defendant may have been, and although he may have made the statements without due and proper inquiry, nevertheless, if in the defendant's mind there was honesty of purpose, the privilege remains. The absence of inquiry is immaterial: *Lister* v. *Perryman*. (2) The defendant is not deprived of the privilege because the jury, as men of the world, would not have adopted the same line of conduct. Whether a person acted maliciously depends upon his own motives and the view which the jury may entertain of the mind of the person himself: *Pitt* v. *Donovan*. (3)

(1) 5 E. & B. 344; 25 L. J. (Q.B.) 25. (2) Law Rep. 4 H. L. 521.
(3) 1 M. & S. 639–649.

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The jury might have been misled by the explanation as to what kind of malice will take away the protection of a privileged occasion. The passage read by the judge from *Bromage* v. *Prosser* (1) refers to malice in law. But in order to render the defendant liable, he must have been actuated by malice in fact, as was laid down by Parke, B., in *Wright* v. *Woodgate* (2): "The proper meaning of a privileged communication is only this, that the occasion on which the communication was made rebuts the inference primâ facie arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, that the defendant was actuated by motives of personal spite or illwill independent of the occasion on which the communication was made." This passage clearly defines what express malice is, and that the onus of proving its existence is on the plaintiff. This case was cited with approval in *Laughton* v. *Bishop of Sodor and Man.* (3) The judge also wrongly directed the jury that there must be an honest belief founded on reasonable grounds; but the defendant is protected if he really did believe the statement to be true, however groundless his belief may have been: *Whiteley* v. *Adams* (4). There was no evidence of malice which ought to have been left to the jury. The discrepancies between the letter of the 2nd of May and the communications made to the defendant are of too slight a character to shew that the defendant was influenced by an indirect motive: *Somerville* v. *Hawkins* (5); *Laughton* v. *Bishop of Sodor and Man* (6); *Child* v. *Affleck.* (7) The case, therefore, ought to have been withdrawn from the jury: *Spill* v. *Maule.* (8)

Dec. 3. *Philbrick, Q.C.*, and *H. Cuffe*, for the plaintiff. It may be admitted that upon a privileged occasion the onus of proof is upon the plaintiff, and that it is for him to shew that the defendant was actuated by malice; but at the trial of the present action the judge did leave to the jury the question whether the letter complained of was written under a feeling of express malice.

(1) 4 B. & C. 247.
(2) 2 C. M. & R. 573, at p. 577.
(3) Law Rep. 4 P. C. 495, 505.
(4) 33 L. J. (C.P.) 89; 15 C. B. (N.S.) 392.
(5) 10 C. B. 583; 20 L. J. (C.P.) 131.
(6) Law Rep. 4 P. C. 495.
(7) 9 B. & C. 403.
(8) Law Rep. 4 Ex. 232.

Pitt v. *Donovan* (1) was an action for slander of title, and it may well be that a person is not liable for setting up a claim to land which may ultimately prove to be groundless, unless he knew it to be false; and *Lister* v. *Perryman* (2) was an action for trespass and false imprisonment; these cases, therefore, are not authorities against the plaintiff. The letter itself, by its terms, affords evidence of express malice; the language is exaggerated, and goes beyond the statement made to the defendant by G. Bevan: *Fryer* v. *Kinnersley* (3); *Gilpin* v. *Fowler*. (4) The communication to Mr. Green was not privileged. There was neither a duty nor an interest to make it.

Dec. 4. *Willis, Q.C.*, in reply. Assuming that the learned judge misdirected the jury, the defendant is entitled to have the verdict entered for him under Order XL., Rule 10, which is extended to the Court of Appeal by Order LVIII., Rule 5.

BRAMWELL, L.J. I think that this appeal must be allowed. In coming to that conclusion I do not take a different view of the law from that adopted by Cockburn, C.J., and Mellor, J.; the difference between their views and ours upon this occasion results from a different appreciation of the summing-up by the judge at the trial.

I certainly think that a summing-up is not to be rigorously criticised; and it would not be right to set aside the verdict of a jury, because in the course of a long and elaborate summing-up the judge has used inaccurate language; the whole of the summing-up must be considered in order to determine whether it afforded a fair guide to the jury, and too much weight must not be allowed to isolated and detached expressions. In the present case, however, I cannot help coming to the conclusion that the question left by the judge to the jury was put in an inaccurate shape. [The Lord Justice read it.] (5) I am of opinion that this was in itself a misdirection, and that the proper direction to the jury would have been as follows:—"These occasions were privileged, and unless you are satisfied that the defendant availed

(1) 1 M. & S. 639.
(2) Law Rep. 4 H. L. 521.
(3) 15 C. B. (N.S.) 422; 33 L. J. (C.P.) 96.
(4) 9 Ex. 615; 23 L. J. (Ex.) 152.
(5) See ante, p. 240.

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himself of them to make the statements complained of maliciously" (with an explanation of what is legally comprehended in that word) "then you ought to find a verdict for the defendant." By the language which the judge used, he led the jury to the conclusion that the burden of proof is upon the defendant. I also think that the form of the question is objectionable in this, that it may have induced the jury to suppose that they were to find affirmatively either that the alleged libel was written bonâ fide, or that the defendant in publishing it was actuated by feelings of malice; and that if they could not find the former, they must find the latter.

Before I proceed further in discussing the language of the summing-up, I wish to remark that a person may honestly make on a particular occasion a defamatory statement without believing it to be true; because the statement may be of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it. Can it be said that the person making the statement is liable to an action for slander? In the present case the judge asked the jury whether the defendant did what is complained of in the honest belief that what he wrote and said with reference to the plaintiff was true. At a later period of the summing-up the judge explains what he means by honest belief; and the effect of his language is, that the jury must have been led to think that "honest belief" means, not the actual belief in the defendant's mind but, belief founded upon reasonable grounds. Apart, therefore, from the question upon whom the burden of proof lay, I think there was a misdirection as to the meaning of the term "honest belief," and that the verdict against the defendant cannot stand.

I do not say that there is no evidence of malice to go to the jury, but I think the evidence was very slight. The conduct of the defendant on the whole is not to be complained of on the ground of rashness, improvidence, or credulity, but in his letter he certainly made use of expressions in excess of the communications he had received: for instance, he was told that the plaintiff had left the army through some trouble at cards, but he writes that he was expelled the army for cheating at cards: he was also told that he had led an irregular life at Cambridge, and, again, he

writes that he had led a profligate life at Cambridge. It is possible that upon those statements being laid before a jury with a proper direction they might think that the defendant was indifferent as to the reputation of others, and that he desired to represent himself as a clergyman zealous for the welfare of the church and the character of its ministers, and that the defendant in making the statements complained of did not act bonâ fide. It is sometimes difficult to determine when defamatory words in a letter may be considered as by themselves affording evidence of malice. It was held (1), in a case cited to us, from the Exchequer Chamber, the judgment of which was delivered by Cockburn, C.J., my Brother Brett forming a member of the Court, that the expressions in the letter complained of could not be evidence of malice, and the question ought not to have been left to the jury; and on the other hand, authorities (2) have been cited in which the Court thought the expressions in the letters of themselves furnished evidence which ought to have been left to the jury. I hesitate to say that there was no evidence of malice, because the jury need not ascertain what the wrong motive was if they can say that there was a wrong motive; and if the defendant was actuated by some motive, other than that which would alone excuse him, the jury may find for the plaintiff. Nevertheless, I have the strongest opinion that the verdict was against the weight of evidence on the question of malice. I am clearly of opinion that if there was more than a scintilla of evidence as to malice a jury properly directed would, upon a fair consideration of the facts proved at the trial, have disregarded it. On the ground of misdirection, and also on the ground of the verdict being against the weight of evidence, I am of opinion that there ought to be a new trial.

Even if I thought, upon the facts proved at the trial, that there was no evidence of malice, I do not think we ought to order a verdict to be entered for the defendant under Order XL., Rule 10. I think that this rule is not applicable to a case where, if a new trial is ordered, further evidence might be adduced; here, if the learned judge ruled that there was no evidence of malice, further

(1) *Spill* v. *Maule*, Law Rep. 4 Ex. 232.

(2) *Gilpin* v. *Fowler*, 9 Ex. 615; 23 L. J. (Ex.) 152; *Fryer* v. *Kinnersley*, 15 C. B. (N.S.) 422; 33 L. J. (C.P.) 96.

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evidence might have been given. I have some doubt whether the communication to Mr. Green was privileged; that might very much depend on the motive with which it was made; it may be privileged if the defendant made the communication to Mr. Green for the purpose of asking his advice; but if he made it merely for the purpose of unburdening his mind, or merely repeating a conversation, the occasion would not be privileged. I think this is another reason why we ought not to act on Order XL., Rule 10. On the two grounds I have already mentioned this appeal ought to be allowed.

BRETT, L.J. I am of opinion that there was a misdirection by the learned judge to the jury; that the verdict was against the weight of the evidence; and that there was no evidence of malice which ought to have been left to the jury.

With regard to the misdirection, we do not differ from the Queen's Bench Division as to the rule of law which governs this case, but we think that the direction of the learned judge was calculated to mislead the jury as to what was the right question for their decision. The direction to the jury was founded on the assumption that the occasions were privileged, and that which must be taken to be a libel would be excused if the defendant had used the privilege fairly and honestly. Before I address myself to the summing up, I think it advisable to lay down what I consider would be a true exposition of the law in such matters. When there has been a writing or a speaking of defamatory matter, and the judge has held—and it is for him to decide the question—that although the matter is defamatory the occasion on which it is either written or spoken is privileged, it is necessary to consider how, although the occasion is privileged, yet the defendant is not permitted to take advantage of the privilege. If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive. If the indirect and wrong motive

suggested to take the defamatory matter out of the privilege is malice, then there are certain tests of malice. Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing for some wrong motive. So if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive. I think I have laid down the correct rule on which to ground the direction to the jury, and I think the learned judge did not follow that rule, but he so expressed himself that the jury would be misled into following other rules. I think the jury were misled into believing that the burden of proof, that the defendant was not actuated by malice in the statements he had made, lay upon the defendant rather than on the plaintiff. I apprehend the moment the judge rules that the occasion is privileged, the burden of shewing that the defendant did not act in respect of the reason of the privilege, but for some other and indirect reason, is thrown upon the plaintiff. I also think that the learned judge was mistaken in the definition of malice he gave to the jury, and the jury might have been misled by his leaving to them to apply that definition to the question of what was malice in fact. The judgment of Bayley, J., in *Bromage* v. *Prosser* (1), treats of malice in law, and no doubt where the word "maliciously" is used in a pleading, it means intentionally, wilfully. It has been decided that if the word "maliciously" is omitted in a declaration for libel, and the words "wrongfully" or "falsely" substituted, it is sufficient, the reason being that the word "maliciously," as used in a pleading, has only a technical meaning; but here we are dealing with malice in fact, and malice then means a wrong feeling in a man's mind. I am further of opinion that the direction to the jury—that assuming that the occasions were privileged if they thought that the

(1) 4 B. & C. cited at p. 255.

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defendant wrote the letter, and made the statements bonâ fide, and in the honest belief that they were true, not merely that he believed them himself, but honestly believed them, which means he had good grounds for believing them to be true,—left the jury to suppose that, although the defendant did believe them in fact, yet that did not protect him unless his belief was reasonable: whereas the only question was whether the defendant did, in fact, believe what he said, and not whether a reasonable man would have believed it. The question of wilful blindness, or of an obstinate adherence to an opinion, may be tests by which a jury may be led to consider whether the defendant did or did not really believe the statements he made; whereas the learned judge, by the way in which he directed the jury, left them to understand, as I think, that although the defendant did believe the statements, yet if his belief was founded on a wrong reasoning that he was not within the protection of the privilege. In that respect, with great deference I think, the learned judge's direction to the jury was erroneous.

I am also of opinion that all the occasions were privileged. The only occasion which has been questioned is the occasion of the defendant's communication with Mr. Green. I am of opinion that where the relation between two persons is so intimate socially and professionally as that between a rector or a vicar and his curate, and when it can be said that the vicar is consulting with his curate either upon the conduct of the curate or of the vicar in ecclesiastical matters, that is an occasion which is privileged. Here the plaintiff calls Mr. Green as his witness, and his evidence is that the vicar did consult him in order to obtain his advice. I think on this point that the plaintiff was bound by the evidence of his own witness, and the moment that it was ascertained as a fact that the statement to Mr. Green was made at a consultation between the vicar and his curate, as to the conduct the vicar should adopt in an ecclesiastical matter, the judge was bound to tell the jury that the communication was made on a privileged occasion.

Assuming that the right question had been left to the jury, is there any evidence to support the finding of malice? Now, the occasion being privileged, the burden of proof to shew that the

defendant was not within the protection of the privilege being on the plaintiff, and it being an admitted fact that the defendant did not know the plaintiff, had never even seen him, and that he had had no relations with him whatever, and no motive can be suggested why the defendant should have a vindictive feeling against the plaintiff, I think that the discrepancies which were relied upon, and the want of care in instituting inquiries, are too slight to justify a judge in asking the jury whether the defendant was actuated by indirect motives in making the statements. He certainly did not make them from a want of belief in them, nor was he influenced by anger in making them, not caring whether they were true or false.

I am of opinion, therefore, if on a new trial the facts are the same, if they cannot be altered, it would be the duty of the judge to direct the jury that there was no evidence of malice which could properly be submitted to the jury. I think that there has been a miscarriage, and that the verdict is against the weight of evidence.

This is not a case in which we ought to enter a verdict for the defendant; for there may be further evidence on a future occasion. We ought, therefore, only to grant a new trial.

COTTON, L.J. I am also of opinion that this appeal must prevail. I think that the learned judge, after ruling that the statements made were privileged, left the case to the jury in a manner which may have misled them as to the true question for their consideration. When once the learned judge had laid down that the occasion was privileged, the only question for the jury to consider was whether the defendant acted from a sense of duty, or was actuated by some improper motive, and the onus of proving that the defendant was influenced by some improper motive, that is, that he acted maliciously, was on the plaintiff. In order to shew that the defendant was acting with malice, it is not enough to shew a want of reasoning power or stupidity, for those things of themselves do not constitute malice: a man may be wanting in reasoning power, or he may be very stupid, still he may be acting bonâ fide, honestly intending to discharge a duty. The question is not whether the defendant has done that which other men as men of the world would not have done, or whether the defendant acted

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in the belief that the statements he made were true, but whether he acted as he did from a desire to discharge his duty.

The learned judge intended to leave the question to the jury in the words of *Whiteley* v. *Adams* (1), subject to what he said as to the definition of honest belief. But the circumstances of *Whiteley* v. *Adams* (1) and the present case are different. In that case the writer of the letter, which was the alleged libel, had pledged his belief in these words: "I will mention two or three [charges] which I have reason to believe are well founded." Therefore in that case it might well be put, as it was put to the jury, Do you or do you not think that the letters were written bonâ fide and in the honest belief that the matters therein contained were true? The writer of the letter stated, "I will mention those charges which I believe to be true," and the judge might properly ask the jury, Do you think that the defendant believed the charges to be true? If at the time he wrote the letter he did not believe them to be true, it might not be an unreasonable inference that he was acting not from a sense of duty, but from some other motive. In the present case the defendant has not stated in the letter set out in the statement of claim that the charges are in his belief true; he has merely stated that communications have been made to him by certain persons. If the defendant did not believe that the statement he was making was the one which had been made to him by Mr. Bevan, that might be evidence of mala mens; and, also, if he knew that there was no foundation for the charge, that again might be some evidence that he was actuated by an improper motive. In the present case it was not a question as to whether the defendant believed the charges to be true; certainly it was not a question whether he honestly believed them, in the sense of believing them on such good grounds that other men would reasonably come to the same conclusion. In the sentence following the question put to the jury, the learned judge explains what he means by honest belief; namely, had the defendant good grounds for believing the statements to be true? It might possibly be argued that the meaning of the words is, had the defendant good grounds to believe that these charges

(1) 15 C. B. (N.S.) 392; 33 L. J. (C.P.) 89.

were made? I do not, however, think that is their fair meaning, and I think that when the question for the jury was the state of the defendant's mind at the time of making the communication, that is, whether he was actuated by malice, and with a motive other than a sense of duty, the question whether he himself believed the charges to be true in the sense attributed by the judge to "honestly believing" was immaterial.

There is also another part of the summing-up in which I think there was a misdirection to the jury. The burden of proof lay upon the plaintiff to shew that the defendant was actuated by malice; but the learned judge told the jury that the defendant might defend himself by the fact that these communications were privileged, but that the defendant must satisfy the jury that what he did he did bonâ fide and in the honest belief that he was making statements which were true. It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty.

With regard to the question as to the statements being privileged, I am of opinion that the learned judge was right in ruling that all the communications were privileged. The only one as to which any doubt could be raised was the communication made to Mr. Green. Mr. Green is the plaintiff's witness, who says the communication was made to him, the curate, when he was in the vestry, and it was made as communications were often made to him by the defendant, for the purpose of asking his advice. On that evidence the learned judge was right in holding that it was a privileged communication. It was a communication made by the vicar to his curate, with whom he was on the terms stated by Mr. Green, with reference to a matter which seriously affected two parishes in the neighbourhood, and which might seriously affect Mr. Green, if by preaching at Mr. Smith's church he was brought into communication with the plaintiff. I am therefore of opinion, the question being for the judge, that his ruling was correct.

On the only other point in the case, I think that there was no evidence of malice to be left to the jury. I am of opinion that in this case the evidence does not raise any presumption of malice on the part of the defendant, according to the law as laid down in

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Somerville v. *Hawkins* (1). It must be borne in mind that the defendant before this affair, had never been brought into connection with the plaintiff; had never had any difference of any kind with him, and it is not suggested that these statements were made by the defendant with a view of exhibiting his zeal and activity as a clergyman. I think the evidence shews that he acted merely from a sense of duty. There are no doubt some discrepancies and inaccuracies between the statement made to the defendant by Mr. Bevan and the words used in the defendant's letters, but in the absence of any other proof of malice, I do not think that the excess of the defendant's expressions raises a presumption of malice. Then it is said that the statements were made to a great number of persons, and that this was some evidence of an indirect motive on the defendant's part in making the communications complained of. But it must be remembered that all the communications were privileged. One was to the clergyman of the parish in whose church the plaintiff was about to preach. It is true that he made this communication through the son, but under the circumstances that is the same as if he had made it directly to the father. Another was to his curate, Mr. Green. Another to Mr. Martin, the rural dean—the communication to this gentleman was for the purpose of taking his advice. He also made statements to Mr. Maud and his solicitor; the statement to the solicitor must be considered as made to Mr. Maud. In my opinion as all these communications were privileged, they do not afford any evidence of malice.

I agree with the other members of the Court, that there should be a new trial.

Judgment reversed, and new trial ordered.

Solicitor for plaintiff: *John Grant.*
Solicitors for defendant: *Few & Co.*

(1) 10 C. B. 583; 20 L. J. (C.P.) 131.

[IN THE COURT OF APPEAL.]

1878
Jan. 30.

WELPLY *v.* BUHL.

Practice—County Court, remitting case to be tried in—30 & 31 *Vict. c.* 142, *s.* 10—*Security for Costs, extension of Time for giving.*

An order was made under 30 & 31 Vict. c. 142, s. 10, remitting an action to be tried in the county court, unless security should be given for costs within a week. The plaintiff failed to comply with the condition stated in the order, but did not lodge the writ and order with the registrar of the county court, pursuant to s. 10, and, after the time mentioned in the order had elapsed, obtained a second order extending the time for giving security:—

Held, affirming the judgment of the Queen's Bench Division, that until the plaintiff had lodged the writ and order remitting the action with the registrar of the county court the action remained in the superior Court, and consequently there was jurisdiction to make the order extending the time for giving security.

APPEAL by the defendant against the decision of the Queen's Bench Division (1), rescinding an order of Fry, J.

An order had been made by a master, under 30 & 31 Vict. c. 142, s. 10, remitting the action to the county court, unless the plaintiff gave security for costs or paid money into court, in lieu of such security, within a week. The plaintiff failed to comply with the condition stated in the order, but did not lodge the writ and order with the registrar of the county court; and, after the expiration of the time mentioned in the order, applied for and obtained another order from the master extending the time for giving security, and paid money into court in conformity with the second order. On appeal to Fry, J., the judge rescinded the master's second order; the Queen's Bench Division reversed the judge's decision.

Anderson, for the defendant. The time for giving security under the master's first order having expired, the master had no jurisdiction to extend the time for giving security. *Whistler* v. *Hancock* (2) decided that where an action was dismissed for want of prosecution, it was at an end, and the Court had no jurisdiction to extend the time for a delivery of statement of claim.

(1) 3 Q. B. D. 80. (2) 3 Q. B. D. 83.

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According to *Moody* v. *Steward* (1) when an action has been sent to be tried in the county court, under 30 & 31 Vict. c. 142, s. 10, it is no longer within the jurisdiction of the superior Court for the purpose of taxing costs. When once an order is made to remit the action, it no longer remains in the High Court.

Tapping, and *J. Macdonald*, for the plaintiff, were not called upon.

BRAMWELL, L.J. We are all of opinion that the judgment must be affirmed for the reasons given in the Court below. I am inclined to think that, even if the case had got into the county court, the master might have rescinded his order, or his order might have been rescinded on appeal. In Chitty's Practice, p. 1537, 10th Ed., it is said: "When an order has been made, or the conditions annexed to an order imposed, under a mistake, or when new circumstances arise which render it clearly essential to the justice of the case, a judge will amend or vary his order, or will sometimes even rescind it when it appears to have been irregularly and improperly obtained." According to this statement of the law, an order may be dealt with at a subsequent time.

I think the reasoning of Cockburn, C.J., and Manisty, J., quite right, and that the appeal should be dismissed.

BRETT, L.J. I think the decision of the Queen's Bench Division was correct. In questions of procedure the master has jurisdiction to rescind or vary an order on proper grounds.

COTTON, L.J. I also am of opinion that the appeal should be dismissed. The cases that have been cited are clearly distinguishable.

Appeal dismissed.

Solicitor for plaintiff: *J. E. S. King.*
Solicitors for defendant: *Alsop & Co.*

(1) Law Rep. 6 Ex. 35.

[CROWN CASE RESERVED.]

THE QUEEN *v.* THE INHABITANTS OF THE TOWNSHIP OF ARDSLEY. 1878 *Feb.* 22.

Highway, indictment for non-repair—Township, liability to repair.

Upon the trial of an indictment against the township of A. for the non-repair of a highway within it, it appeared that A. was one of seven townships forming the parish of D. The parish itself had never repaired any highway, nor levied highway rates, nor appointed surveyors; each township having appointed its own surveyors, and levied its own highway rates. With the exception of the highway in question, and one other, each of the seven townships had from time immemorial repaired its own highways. The highway had always been repaired by the adjoining township of W., but there was no evidence of any consideration for such repair:—

Held, that A. was liable, for it must be presumed that the repairs had been done by W. under some arrangement between the two townships, and such arrangement in the absence of sufficient consideration was not binding on W.

CASE stated by the Chairman of Quarter Sessions for the West Riding of York, upon a conviction of the inhabitants of the township of Ardsley for not repairing a highway situate within that township.

The parish in which the township of Ardsley is situate is divided into seven townships, each of which (with the two exceptions hereinafter mentioned) has repaired its own highways. There is an immemorial custom for each township to repair all highways (with the two exceptions hereinafter mentioned) within the limits of the respective townships.

Each township has appointed its own surveyors and levied its own highway rates.

There have never been any repairs done by the parish at large, nor have any rates been levied for the parish at large, and no surveyors have been appointed for the parish.

The portion of road indicted is within the township of Ardsley, and is out of repair. Although the portion of road lies within the township of Ardsley, yet down to the year 1868 (since which time Wombwell has denied its liabilty to repair the same) and so far as its previous history can be traced, it has always been repaired by the adjoining township of Wombwell; but there is no evidence to show when, and for what consideration (if any), Wombwell

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commenced to repair the road in question. There is also in the township of Ardsley another road which was till three years ago a turnpike road, leading from Doncaster to Saltersbrook. Five hundred yards of this turnpike road situate in the township of Ardsley have from time to time been repaired by the township of Darfield (one of the other seven townships into which the parish of Darfield is divided as aforesaid). Ardsley has repaired the remaining part of this turnpike road situate in Ardsley. These repairs (that is to say the repairs done by the township of Darfield as well as those done by the township of Ardsley) were directed by the trustees of the turnpike road and paid for by them. The trustees paid a sum of money out of the tolls to the township of Darfield, and also a sum of money to the township of Ardsley, to repair this road, and the sums of money so paid have been applied to the repair of the road in each township. If the sums so paid to the township of Darfield were not sufficient, the township rates of Darfield made up the difference, so far as the 500 yards in Ardsley were concerned.

The same thing occurred in Ardsley as to the remaining part of the turnpike road, situate in the township of Ardsley.

Since the expiration of the Turnpike Act, Darfield has not repaired any part of the old turnpike road in Ardsley.

With the above exceptions, each of the seven townships repaired its own highways.

The road indicted is part of an ancient and immemorial highway.

Upon these facts I directed the jury to find the defendants guilty, and they were convicted; and I respited the judgment, and reserved for the consideration of this Court the question whether I was right in so directing the jury as above-mentioned.

J. Forbes, for the defendants. Of common right a division of a parish is not liable to repair the highways within it, but that duty is imposed upon the whole parish. Notwithstanding that the township of Wombwell has repaired the highway in question, there is nothing to relieve the parish from their duty to repair. In order to charge the township of Ardsley the Court must infer that the township has from time immemorial undertaken the duty

of repairing the highway, but this cannot be inferred, because it is at variance with the facts found in the case; namely, that another township has always repaired it.

[COCKBURN, C.J. Why should we not infer that the township of Wombwell repaired under some arrangement with Ardsley, and that in repairing they were repairing for and on behalf of the indicted township?]

The case finds no such arrangement, and if such an inference was to be drawn, it should have been drawn by the jury. No question was left to the jury as to this matter, and they have found no facts to justify such an inference. If any such inference is to be drawn by the Court, the proper inference would rather be that the township of Wombwell was repairing by virtue of arrangement with the whole parish, the body primâ facie liable to repair. [The following authorities were referred to: Starkie on Evidence, p. 696, note (*t*); *Rex* v. *Hatfield* (1); *Reg.* v. *Barnoldswick* (2); *Rex* v. *Great Broughton.* (3)]

H. Matthews, Q.C., and *Bosanquet*, for the prosecution, were not called upon.

COCKBURN, C.J. I think that the conviction must be affirmed. It is quite clear that the entire parish has never maintained the highways within it, that it has had no machinery for so doing, that it has never appointed officers for that purpose, and that it has never collected highway rates. The entire parish consists of seven townships, each of which has fulfilled generally the functions of a parish with regard to the highways within it. It would be vain now to contend, seeing the large and important townships that exist, that a township may not be liable, to the same extent and in the same way as if it were a parish, to maintain its highways. Independently, therefore, of the question between Ardsley and Wombwell, Ardsley is liable. How can Ardsley get rid of its liability? It is stated in the case that the highway was always repaired by Wombwell, but it is further stated that there was no evidence of any consideration for the repairing of the highway in question by Wombwell, so that there is no power to compel Wombwell to continue to repair it. It is, therefore, no

(1) 4 B. & Al. 75. (2) 4 Q. B. 499.

(3) 5 Burr. 2700.

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answer to the present indictment to say that Wombwell always did repair, and the public have a right to have the road repaired by the present defendants. I therefore consider the verdict right.

CLEASBY, B., LINDLEY, MANISTY, and HAWKINS, JJ., concurred.

Conviction affirmed.

Solicitors for prosecution: *Wilkinson & Son, for Dibb & Raley, Barnsley.*

Solicitor for defendants: *H. H. Poole, for W. H. Peacock, Barnsley.*

[IN THE COURT OF APPEAL.]

1877
Dec. 18.

HOOPER AND ANOTHER *v.* BOURNE, THE WESTBURY IRON COMPANY, LIMITED, AND THE GREAT WESTERN RAILWAY COMPANY.

Railway—Superfluous Lands—Lands taken under Powers of Special Act—Lands acquired for Extraordinary Purposes—Lands not in actual use at expiration of period limited for disposing of Superfluous Land, but subsequently becoming useful for Purposes of Undertaking—Mines and Minerals expressly conveyed to Railway Company, ownership of, where Surface afterwards becomes Superfluous Land—Inclosure—Grass and Herbage arising upon Soil of Road running between Allotments—41 *Geo* 3, *c.* 109, *s.* 11—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18) *ss.* 12, 13, 127—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 45.

4 QBD 448
12 Ch D. 46
36 Ch D. 184
18 Q B D 192
20 Ch D 425
431
— 566

Where a railway company are authorised by their Special Act (with which the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, are incorporated) to acquire lands compulsorily and also for extraordinary purposes, land delineated in the parliamentary plans, and described in the books of reference, and purchased by the company pursuant to agreement, no notice to treat having been given, must be deemed to have been acquired under the "provisions" of the Special Act, and the Lands Clauses Consolidation Act, 1845, within the meaning of s. 127 of the latter Act; and although for some years after the purchase no works are constructed upon the land, yet if at a subsequent time it becomes useful for the purposes of the railway, it cannot be deemed to have been purchased for extraordinary purposes.

Where lands have been taken by a railway company under the provisions of their Special Act, and retained by them, with the bonâ fide intention of using them for the purposes of the railway, and at the expiration of the period for the sale of superfluous lands, though they are not in actual use, there is a reasonable prospect of their being ultimately required and used for the purposes of the railway, such lands are not superfluous within the Lands Clauses Consolidation Act, 1845, s. 127.

By Bramwell and Brett, L.JJ.:—Where lands which a railway company are

authorised by their special Act to take, have been conveyed to them, together with an express grant of the mines and minerals thereunder, although the surface may afterwards become superfluous by virtue of the Lands Clauses Consolidation Act, 1845, s. 127, yet the mines and minerals do not vest in the adjoining owners.

By Bramwell and Brett, L.JJ.:—Where commonable lands have been inclosed under an award made pursuant to a local statute, passed subsequently to 41 Geo. 3, c. 109, and by the award the soil of the roads running between the allotments remains vested in the lord of the manor, if the land upon one side of a road becomes superfluous within the Lands Clauses Consolidation Act, 1845, s. 127, it will vest in the lord of the manor, for the right to the grass and herbage arising upon the road, under 41 Geo. 3, c. 109, s. 11, is insufficient to render the proprietor of the close upon the other side of the road an adjoining owner.

Semble, by Bramwell, L.J., where the natural drainage of land, belonging to a railway company and demised by them for agricultural purposes, flows into a reservoir used by them for the supply of water to their engines, the land is not superfluous within the Lands Clauses Consolidation Act, 1845, s. 127.

APPEAL from the judgment of the Queen's Bench Division in favour of the defendants. (1)

This was a special case, stated by an arbitrator in an action of ejectment, brought to recover three closes of land, containing together thirteen acres or thereabouts. The writ of summons was tested on the 11th of May, 1875.

1. By the Wilts, Somerset, and Weymouth Railway Act, 1845 (2) (with which the Lands Clauses Consolidation Act, 1845 and the Railways Clauses Consolidation Act, 1845, were incorporated), the Wilts, Somerset, and Weymouth Railway Company was incorporated for the purpose of making a railway from the Great Western Railway to the city of Salisbury and town of Weymouth, with other railways in connection therewith. By s. 47, the quantity of land to be taken for extraordinary purposes was not to exceed 100 acres.

2. The Wilts, Somerset, and Weymouth Railway (Amendment) Act, 1846 (3) (with which the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, were incorporated), was passed to authorize certain alterations and extensions of the line of the Wilts, Somerset, and Weymouth Railway. By the 2nd section of the last-mentioned Act, the provisions of the Wilts, Somerset, and Weymouth Railway Act, 1845,

(1) 2 Q. B. D. 339.

(2) 8 & 9 Vict. c. liii.

(3) 9 & 10 Vict. c. cccxiii.

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were extended to it. By the 10th section of the last-mentioned Act the company were authorized, amongst other things, to construct a railway passing through the parish of Westbury. By s. 12 of the Act of 1846, after reciting that plans and sections of the altered or new lines of railway and extensions of the Wilts, Somerset, and Weymouth Railway, shewing the directions and levels thereof, and also books of reference containing the names of the owners, lessees, and occupiers, or reputed owners, lessees, and occupiers of the lands through which the same were intended to pass had been deposited with the clerks of the peace for the counties of Wilts, Somerset, and Dorset, it was enacted that, subject to the powers of deviation in the Railways Clauses Consolidation Act contained, the said altered or new lines of railway and extensions should be made according to the lines and levels thereof as defined in the said plans and sections; and, subject to the provisions in this and the Wilts, Somerset, and Weymouth Railway Act, 1845, as extended to this Act contained, it should be lawful for the said company to enter upon, take, and use such of the lands delineated on the said plans, and described in the said books of reference, as should be necessary for the purposes of such altered or new lines and extensions.

3. By s. 24 of the Act of 1846, the altered or new and extended lines of railway by this Act authorized, were to be completed within five years from the passing of that Act, and on the expiration of such period the powers, granted to the company for executing the same or otherwise in relation thereto, were to cease to be exercised, except as to so much of the said lines of railway as should then be completed. This Act received the Royal Assent on the 3rd of August, 1846; the time for the completion of the said railways as prescribed by that Act therefore expired on the 3rd of August, 1851.

4. By a warrant under the seal of the Commissioners of Railways bearing date the 12th of April, 1848, and made in pursuance of an Act intituled "An Act to give further time for making certain Railways," the period of time limited by the Act of 1846 for the completion of the altered and extended lines of railway was extended for the further period of two years, that is, to the 3rd of August, 1853.

5. By the Great Western Railway Act, 1851 (1), the Wilts, Somerset, and Weymouth Railway Company, was dissolved, and the undertaking of that company was thereby transferred to and remained vested in the Great Western Railway Company, with all rights, powers, privileges, and liabilities incidental thereto.

6. At the time of the execution of the indenture, dated the 25th of March, 1848, mentioned in paragraph 9, the freehold and inheritance in fee simple of the two several pieces of land containing together nineteen acres thereby conveyed to the Wilts, Somerset, and Weymouth Railway Company, were vested in William Rossiter and John Rossiter, as trustees, with power of sale (with the consent of the Rev. John Hooper and Elizabeth Ann, his wife), under an indenture of settlement, dated the 20th of November, 1818.

7. The whole of the said two pieces of land, containing together nineteen acres, were included in the plans and books of reference deposited with the clerk of the peace of the county of Wilts, and referred to by the secondly mentioned Act; but a portion thereof, containing about 7½ acres, was not included within the limits of deviation.

8. No notice to treat was served by the Wilts, Somerset, and Weymouth Railway Company, or on their behalf, on any person interested in the two pieces of land containing nineteen acres, or any part thereof; but by an agreement, dated the 1st of March, 1848, the Wilts, Somerset, and Weymouth Railway Company contracted with W. Rossiter and J. Rossiter, as trustees for the Rev. J. Hooper and his wife, for the purchase of the freehold and inheritance of the two pieces of land containing together nineteen acres, together with the mines under and timber on them, at the price of 3280*l.*, which was to be in full satisfaction for all works for the accommodation of lands adjoining the railway, and for all gates, bridges, fences, &c., and was to include all severance and other damage.

9. By an indenture dated the 25th of March, 1848, and made between the said W. Rossiter and J. Rossiter of the first part, the Rev. John Hooper and Elizabeth Ann, his wife, of the second part, and the Wilts, Somerset, and Weymouth Railway Company

(1) 14 & 15 Vict. c. xlviii.

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of the third part, the said W. Rossiter and J. Rossiter, at the request, and by the direction of the said J. Hooper and Elizabeth Ann, his wife, in pursuance of the last mentioned agreement, and for the consideration therein mentioned, appointed and conveyed unto that company, their successors and assigns, the two pieces or parcels of land containing together nineteen acres, together with the cottage or tenement and outhouse thereto adjoining and belonging, erected on one of the said pieces, together with all mines and minerals thereunder, and all timbers and woods thereupon, which said two pieces of land in the said indenture were stated to be (and in fact were) in the maps or plans of the lines or course of the railway deposited with the clerk of the peace.

10. Shortly after the completion of the purchase the said company took possession of the said two pieces of land containing together nineteen acres, and upon the north-western part thereof, containing about six acres constructed in part the line of railway, together with a station and other works connected with the railway and known as the Westbury station. The line of railway, the station, and other works were constructed within the limits of deviation.

11. After the railway was constructed, and down to the commencement of the action, the unused part of the nineteen acres of the land conveyed to the Wilts, Somerset, and Weymouth Railway Company was divided into the three pieces containing together about thirteen acres of land, being the closes sought to be recovered and hereinafter called respectively No. 1, No. 2, and No. 3. They were all bounded to the north-west by the line of railway, and the extreme eastern portions of all of them lay without the limits of deviation, and constituted together the portion containing about 7½ acres mentioned in paragraph 7. The unused part of the larger of the two closes conveyed to the railway company had been divided by a road running in a curved line to Westbury station, called Station Road, and thus formed No. 1 and No. 2. The Station Road was not included in the writ. It was made by the Wilts, Somerset, and Weymouth Railway Company, at or about the time of the construction of the railway, for the purpose of affording access to the passenger station. It was a private road belonging to the Great Western Railway Company,

who were the owners of the soil, and had always been, and still was, used exclusively for the purposes of the railway.

No. 1 was of irregular shape: it was bounded upon the south and east almost wholly by land which in 1863 was and still is the plaintiffs': upon the north and west by the Station Road and the works and station belonging to the railway. At the station (but not upon any part of the land claimed by the plaintiffs) was a well which had been sunk by the Wilts, Somerset, and Weymouth Railway Company in the year 1848, for the purpose of supplying the engines used on the line with water. The water was pumped from the well into a neighbouring tank, and was taken from the tank for the use of the engines. About four or five years after the making of the well, in consequence of the well not supplying sufficient water for the use of the engines, the Great Western Railway Company caused to be dug in No. 1, near its middle, a reservoir, and caused two sets of pipes to be laid under the intermediate ground from the reservoir into the well, one set of the said pipes being laid at the bottom of the reservoir, and the other set of pipes being laid five or six feet above the first mentioned set of pipes. The reservoir was supplied with water by the natural drainage from the surrounding lands, and from the time of its formation to the time of stating the special case, water had run through the sets of pipes into the well, and had fed the water of the well in more or less quantities according to the season of the year, the reservoir in summer being nearly dry. At the north-east corner of No. 1 stood the cottage, which was conveyed to the Wilts, Somerset, and Weymouth Railway Company by the indenture dated the 25th of March, 1848. It had been occupied from the year 1850 to the year 1875 by successive servants of that company, and of the Great Western Railway Company, and since the last mentioned year had been unoccupied. No. 1 contained 5*a*. 1*r*. 19*p*., of which 1*a*. 3*r*. 36*p*. lay within the limits of deviation, and 3*a*. 1*r*. 23*p*. beyond them.

No. 2 was of triangular shape: it was bounded upon the south by the Station Road running in a curved line, as already mentioned, and separating it from No. 1; on the north-west by the line and railway works; and on the north-east by the road from Westbury to Storridge, hereafter mentioned. It contained 1*a*. 3*r*. 19*p*., of

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which 1*a.* 1*r.* 36*p.* lay within the limits of deviation, and 1*r.* 23*p.* beyond them.

No. 3 was in shape nearly a square: it was bounded on the north-west by the railway; upon the north-east by land belonging to the precentors of Sarum; upon the south-west by the road from Westbury to Storridge, separating it from No. 1 and No. 2; and on the south-east by a road leading from Westbury to Hawkbridge hereafter mentioned; upon the opposite side of the last mentioned road the plaintiffs were in 1863, and still were, owners of land which faced a portion of the south-eastern side of No. 3. No. 3 contained 5*a.* 2*r.* 10*p.*, of which 1*a.* 3*r.* 1*p.* lay within the limits of deviation, and 3*a.* 3*r.* 9*p.* beyond.

The road from Westbury to Storridge led from south-east to north-west: it separated No. 1 and No. 2 on its south-western side from No. 3 on its north-eastern side; it afterwards crossed the railway at right angles. The road from Westbury to Hawkbridge turned out of the road from Westbury to Storridge at right angles, and ran in a north-eastern direction: as before-mentioned it formed the south-eastern boundary of No. 3. Each of these two roads was a highway set out and appointed in and by an award made the 29th of July, 1808, by commissioners named in and appointed by an Act of Parliament passed in the 42nd year of Geo. 3 (c. lxxii.), intituled "An Act for dividing and allotting in severalty the open and common arable fields, common downs, common meadows, common pastures, and commonable places within the parish of Westbury in the county of Wilts:" each of the roads was described in the award as "One other carriage road and drift way . . . . for the use of the owners and occupiers for the time being of allotments and old inclosed lands adjoining and to which it leads and also as a public bridle way." These roads respectively, before and at the time of the conveyance to the Wilts, Somerset, and Weymouth Railway Company, had been and still were, public highways for carriages, horses, and foot passengers, and repairable by the parish as such.

The land upon the north-west side of the railway, opposite to No. 1, No. 2, and No. 3, was the land from which they had been severed in 1848; and in 1863 it belonged, and did still belong, to the plaintiffs.

12. By an agreement dated the 24th of December, 1849, the Wilts, Somerset, and Weymouth Railway Company let No. 1, No. 2, and No. 3, to James Bourne, as tenant from year to year; but the agreement contained a provision that if the company should at any time require the pieces of land for the purposes of their Act, or for any purpose connected with their railway, it should be lawful for the company on giving two months' notice in writing to the tenant, to determine the agreement, and to enter into and upon, to hold, occupy, and enjoy the said premises as if the agreement had never been made, immediately on the expiration of the two months, whether they should end with the current year of the tenancy or not. The three pieces of land were occupied by James Bourne and his successors in title under the agreement until the 16th of August, 1871, and were during that period of time used by them solely for agricultural and farming purposes.

13. By an agreement dated the 18th of August, 1871, the Great Western Railway Company let the three pieces of land, No. 1, No. 2, and No. 3, to the Westbury Iron Company, Limited, as tenants from year to year, such letting being subsidiary to a licence, which, by an indenture dated the 16th of August, 1871, the Great Western Railway Company had granted to the Westbury Iron Company to work the iron ore under the pieces of land. The last mentioned agreement contained a provision, that in the event of the railway company requiring the whole or any portion of the land for any purpose whatsoever, they should be entitled to take possession of the same, and to put an end to the tenancy upon giving twenty-eight days' notice in writing. The indenture dated the 16th of August, 1871, contained a provision having the like object with the above-mentioned provision in the agreement, dated the 18th of August, 1871. The Westbury Iron Company, Limited, had occupied the three pieces of land under and by virtue of the licence and agreement respectively from the dates thereof until the time of stating the special case, and had in part used them for the purposes therein mentioned respectively.

14. Since the year 1868 the railway traffic at Westbury station had much increased, and since that period of time the three pieces of land, No. 1, No. 2, and No. 3, had been and still were,

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required for the purpose of constructing additional sidings upon them to accommodate the increased traffic. The want of such additional accommodation was, during the period aforesaid, a subject of frequent discussion between the several district officers of the Great Western Railway Company having the general supervision of the traffic at the Westbury station; but in consequence of general instructions from the general manager of the company, that, as the company were expending large sums of money upon other works, district officers were not to ask for anything that was not necessary or could possibly be postponed, no requisition was made by the district officers to the company since that period to provide such additional accommodation, nor did the company, since that period, provide, or take any steps to provide, such additional accommodation, and the three pieces of land had, since that period, remained, and still remained, in the same state as they were up to the end of the year 1868.

19. The plaintiffs contended that the three pieces of land, No. 1, No. 2, and No. 3, were superfluous land within the meaning of s. 127 (1) of the Lands Clauses Consolidation Act, 1845, and were vested in the plaintiffs.

20. The defendants, on the other hand, contended that the three pieces of land claimed by the plaintiffs were not superfluous land within the meaning of that section, and that the plaintiffs were not entitled to recover them.

21. The Court were to have the same power of drawing inferences of fact as a jury would have.

22. The question for the opinion of the Court was whether,

(1) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 127, "And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows: Within the prescribed period, or if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands, and apply the purchase-money arising from such sales to the purposes of the special Act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same."

under the circumstances hereinbefore set forth, the plaintiffs were entitled to recover possession of the whole or any, and what, part of the lands claimed in the writ.

Dec. 11, 12, 13, 18. *H. T. Cole*, *Q.C.*, and *C. G. Merewether*, *Q.C.*, for the plaintiffs. This case is distinguishable from *Betts* v. *Great Eastern Ry. Co.* (1), for in that case the jury found (2) that the land in dispute had been ever since it was taken, and still was, retained bonâ fide for the purposes of the line, whereas here it is found that the land sought to be recovered was conveyed to the Wilts, Somerset, and Weymouth Railway Company in March, 1848, and that it was not required for the use of the railway until the year 1868. As the land was not in use upon the last day of the ten years computed from the expiration of the time limited for the completion of the railway, it was superfluous, according to the principles laid down in *Great Western Ry. Co.* v. *May* (3). Upon the 3rd of August, 1863, there was no pretence for saying that the land was wanted; it had not then occurred to any of the officials that additional sidings would be needed for the increasing traffic upon the railway, and, in fact, they had never been constructed. The judgments delivered in the Queen's Bench Division in the present case are irreconcilable with *Great Western Ry. Co.* v. *May* (4); for ever since the land was purchased, a period of almost thirty years, it has never been used for the purposes of the railway; it has been let for agricultural and farming and mining purposes, and from its large size, some part at least cannot be wanted for the increased traffic. At the expiration of the ten years the officials of the company, as is pointed out by Lord Cairns, L.C., in *Great Western Ry. Co.* v. *May* (4), must determine whether the land is superfluous or not; to judge from the facts stated, the engineers of the Great Western Railway Company were of opinion, in 1863, that the land was not required for the purposes of the undertaking. The officials of the company ought, by the performance of some act, to have made an election whether the land sought to be recovered

(1) Law Rep. 8 Ex. 294. Judgment affirmed in the Court of Appeal, 25th February, 1878.

(2) Law Rep. 8 Ex. 297.

(3) Law Rep. 7 H. L. 283.

(4) Law Rep. 7 H. L. 283, 294.

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was wanted for the purposes of the undertaking. It may be argued, on the part of the defendants, that although the land is superfluous it did not vest in the plaintiffs by force of the Lands Clauses Consolidation Act, 1845, s. 127; but the land was taken under the powers of the special Act, although no notice to treat was given and an agreement for the purchase of it was executed; this is clear from the terms of the conveyance to the Wilts, Somerset, and Weymouth Railway Company, and also from the circumstance that the land was included within the plans and the books of reference deposited with the clerk of the peace, and that company had, by s. 12 of the Wilts, Somerset, and Weymouth Railway (Amendment) Act, 1846, power to take the lands delineated on the plans and described in the books of reference.

C. Bowen, and *Moulton*, for the defendants. The burden of proof lies upon the plaintiffs, for the statute imposes a forfeiture, and therefore must be construed strictly. The question is whether, at the expiration of the ten years, the land was required for the purposes of the undertaking, and it may be required, although it is not in actual use. The argument for the plaintiffs is fallacious, that a railway company must decide at the end of the ten years whether land not in actual use is superfluous; this construction is not supported by any provision in the Lands Clauses Consolidation Act, 1845; but if it is necessary for a railway company at that period to elect whether land is or is not required, then an election has been made that the land in dispute is not superfluous. It is found as a fact that the land was wanted in 1868, and this raises a strong presumption that it was wanted in 1863. The long time which elapsed before the plaintiffs began to assert their claim is evidence against them that they thought the land would be wanted. It is true that the company have demised the land for agricultural and farming purposes and mining purposes, but a power to resume possession upon a short notice was reserved. Then plot No. 1 was, in 1863, actually wanted for the supply of water to the reservoir, which was fed by the natural drainage from the surrounding lands. In the judgment of Lord Cairns, L.C., in *Great Western Ry. Co.* v. *May* (1) it is stated that superfluous lands may be divided into four classes, but the land in dispute does not fall within the

(1) Law Rep. 7 H. L. 283, at pp. 292, 293.

definition of any one of those classes. Further, the land in dispute was not acquired under the compulsory powers of the company, through whom the Great Western Railway Company claim it; and this is a further reason for holding that it did not vest in the plaintiffs as adjoining owners. That company gave no notice to treat; the land was conveyed pursuant to agreement, and was, in fact, acquired for extraordinary purposes under the Lands Clauses Consolidation Act, 1845, ss. 12, 13, and the Railway Clauses Consolidation Act, 1845, s. 45 (1); for if the plaintiffs

(1) By the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), s. 6, "And with respect to the purchase of lands by agreement, be it enacted as follows: Subject to the provisions of this and the special Act, it shall be lawful for the promoters of the undertaking to agree with the owners of any lands by the special Act authorized to be taken, and which shall be required for the purposes of such Act, and with all parties having any estate or interest in such lands, or by this or the special Act enabled to sell and convey the same, for the absolute purchase, for a consideration in money, of any such lands, or such parts thereof as they shall think proper, and of all estates and interests in such lands, of what kind soever."

By s. 12, "In case the promoters of the undertaking shall be empowered by the special Act to purchase lands for extraordinary purposes, it shall be lawful for all parties who, under the provisions hereinbefore contained, would be enabled to sell and convey lands, to sell and convey the lands so authorized to be purchased for extraordinary purposes."

By s. 13, "It shall be lawful for the promoters of the undertaking to sell the lands which they shall have so acquired for extraordinary purposes, or any part thereof, in such manner and for such considerations, and to such persons as the promoters of the undertaking may think fit, and again to purchase other lands for the like purposes, and afterwards sell the same, and so from time to time; but the total quantity of land to be held at any one time by the promoters of the undertaking for the purposes aforesaid shall not exceed the prescribed quantity."

Sect. 16 and the following sections relate to the purchase and taking of lands otherwise than by agreement; s. 18 relates to the giving of notices to treat.

By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 45, "It shall be lawful for the company, in addition to the lands authorized to be compulsorily taken by them under the powers of this or the special Act, to contract with any party willing to sell the same for the purchase of any land adjoining or near to the railway, not exceeding in the whole the prescribed number of acres for extraordinary purposes (that is to say) for the purpose of making and providing additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving, depositing, and loading or unloading goods or cattle to be conveyed upon the railand for the erection of weighing machines, toll-houses, offices, warehouses, and other buildings and conveniences;

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are right that the land in dispute is useless to the Great Western Railway Company, it has not been acquired under the Lands Clauses Consolidation Act, 1845, s. 6, because that refers only to land by the special Act "authorized to be taken, and which shall be required for the purposes of such Act." And it has been decided by the House of Lords in *City of Glasgow Union Ry. Co.* v. *Caledonian Ry. Co.* (1), that land acquired for extraordinary purposes does not vest in adjoining owners: *Horne* v. *Lymington Ry. Co.* (2) The difference between land acquired by voluntary agreement and under compulsory powers becomes clear upon referring to *Lord Carington* v. *Wycombe Ry. Co.* (3) Further, a railway company has no power to take mines compulsorily: *Great Western Ry. Co.* v. *Bennett* (4); *Great Western Ry. Co.* v. *Smith* (5); and as the conveyance to the Wilts, Somerset, and Weymouth Railway Company expressly includes "all mines and minerals," it is clear that the land in dispute was acquired by voluntary agreement. A railway company is a corporation; and possibly, under the Statutes of Mortmain, if they purchase by agreement lands not required for the purposes of the undertaking, the Crown may be entitled to the lands, but they do not vest in the adjoining owners under s. 127. In any event the land beyond the limits of deviation was not acquired under the compulsory powers. Then the plaintiffs are not adjoining owners as to Nos. 2 and 3. They cannot be adjoining owners in respect of their land situate on the north-west side of the railway. The Great Western Railway Company, whose line bounds the land in dispute, are the adjoining owners upon the north-western side. The plaintiffs are not adjoining owners in respect of their land situate upon the south-east side of No. 3, for their land is separated from it by the road to Hawkbridge, and that road having been set out under an award made pursuant to parliamentary powers, its soil remains vested in the representatives of the lord of the manor. No. 2 is bounded

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for the purpose of making convenient roads or ways to the railway, or any other purpose which may be requisite or convenient for the formation or use of the railway."

(1) Law Rep. 2 Sc. Ap. 160.

(2) 31 L. T. (N.S.) 167.

(3) Law Rep. 3 Ch. 377.

(4) Law Rep. 2 H. L. 27.

(5) 2 Ch. D. 235, at p. 244; on appeal, 3 Ap. Cas. 165.

upon the south by the Station Road, which is clearly vested in the Great Western Railway Company, and not in the plaintiffs.

Merewether, Q.C., in reply. The Lands Clauses Consolidation Act, 1845, ss. 12, 13, and the Railways Clauses Consolidation Act, 1845, s. 45, were intended to allow a railway company to buy additional land in case their engineers miscalculated the amount necessary for the construction of the railway. The land in dispute being delineated in the parliamentary plan and described in the books of reference was taken under the powers of the special Act, although no notice to treat was given, and it is immaterial that a portion of it lay beyond the limits of deviation, for land so situate is acquired under the powers of the special Act: *May* v. *Great Western Ry. Co.* (1) The period of ten years is assigned in order that a company may ascertain what lands they really want for the purposes of the undertaking. Granted that the land has been wanted for sidings since 1868, nevertheless it was not required for the purposes of the railway between 1848, when it was bought, and that year, a period of twenty years; it was, therefore, in 1863, superfluous land. Then the plaintiffs are adjoining owners by reason of their lands upon the north-west side of the railway. The land in dispute was originally severed from the plaintiffs' land upon the north-west side of the railway; they were entitled to the right of pre-emption under the Lands Clauses Consolidation Act, 1845, s. 128 (2), and must be the adjoining owners, in whom the land vested. If a different construction were adopted, the Great Western Railway Company would, by virtue of their line, be the adjoining owners on the north-west side of the land in dispute.

Further, the plaintiffs are adjoining owners to No 3 by reason of their land upon the south-east side thereof; it may be admitted that as the road to Hawkbridge was set out under an award made pursuant to parliamentary powers, no presumption of law arises, that its soil belongs to the proprietors of the neighbouring lands:

(1) Law Rep. 7 Q. B. 364; per Blackburn, J., at p. 382, and per Quain, J. at p. 386.

(2) By the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict c. 18), s. 128: "Before the promoters of the undertaking dispose of any such superfluous lands, they shall . . . . first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed."

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Rex v. *Hatfield* (1); but under 41 Geo. 3, c. 109, s. 11, the grass and herbage belong to them (2); and the enjoyment of the pasturage is substantially the only benefit which can arise from the use of the soil of a road; therefore the proprietors of the neighbouring land, including the plaintiffs, having the same benefit as if they were seised of the soil of the road, are adjoining owners within the meaning of the Lands Clauses Consolidation Act, 1845, s. 127.

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BRAMWELL, L.J. I cannot help considering this an action which ought not to have been brought; for even if the plaintiffs were right in point of law, it would have been more equitable in them to offer to pay to the Great Western Railway Company the fair price of the land, and thereby to settle the dispute, than to endeavour to take possession of it by legal process; and therefore in deciding this case it is necessary to guard against any pre-possessions in favour of the defendants, and to resist any bias adverse to the claim of the plaintiffs.

I think that ss. 12, 13 of the Lands Clauses Consolidation Act, 1845, and s. 45 of the Railways Clauses Consolidation Act, 1845, do not apply to the present action; the land sought to be recovered was not wanted for extraordinary purposes. It is not necessary now to give an interpretation of these sections, but I may say that they seem to be intended to enable the promoters to acquire land, which at the time of passing the special Act was not supposed to be required for the undertaking; the purposes, for which additional land is allowed to be acquired after the special Act is passed, must be those described in the 45th section of the Railways Clauses Consolidation Act, 1845, or at least analogous thereto. It seems to me plain that these enactments do not protect the defendants.

I think, also, that s. 127 of that statute and those which follow are not restricted to cases where land has been acquired under what are called its compulsory powers; no limitation of that kind exists in express terms, and the only mode in which the scope of the sections can be confined so as to suit the defendants' contention

(1) 4 A. & E. 156, at p. 164, per Lord Denman, C.J.

(2) By the grant of herbage the soil does not pass: Co. Litt. 4 b.

is by construing the words in the introductory portion, "under the provisions," as if they were "by virtue of the compulsory powers;" but I see no reason why the limitation suggested should be created. It seems to me that the object of these sections is as applicable to lands acquired by negotiation, where the special Act confers a power to take them, as to lands which are not so acquired. If a different construction were adopted, it would be hard to draw a line as to the application of these sections. The company who are now represented by the Great Western Railway Company intimated that they wanted amongst others the land in dispute, and they came to an agreement with the then owners as to what should be taken and what should be paid. But suppose that the company and the then owners had not in the first instance been able to agree, and that the company had given notice to treat, and that afterwards, but before any further proceeding was taken, an agreement was arrived at: I see no substantial distinction between that state of facts and what actually happened in this case. Suppose that the proceedings between the company and the owners had gone further, and that a claim had been sent in which was objected to, and that notice had been given to summon a jury to assess the compensation, and even that a jury had been summoned and had met together, and that the parties had appeared before it, and that an agreement had then been arrived at: I still think that no distinction in principle can be made between such circumstances as I have last mentioned and the actual facts of this case. It seems to me that where a company are empowered to take lands compulsorily, no distinction can be drawn between those lands which they take not by having recourse to their compulsory powers, but by agreement, the owner knowing that if he does not agree he will be forced to part with them, and those lands which are taken without any agreement, the owner opposing and obstructing every proceeding of the company; the same principle applies in all the instances which I have alluded to. I therefore think that the lands sought to be recovered were acquired by the company who were promoters of the original undertaking "under the provisions of" the Lands Clauses Consolidation Act, 1845, and of their special Act.

The next question to be determined is whether the land sought

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to be recovered is "superfluous land," within the meaning of s. 127 of the Lands Clauses Consolidation Act, 1845; that section enacts that within a limited period, in this case ten years, from the expiration of the time fixed for the completion of the works, "the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands." It has been laid down by an authority binding upon us that for the purposes of this section the point of time to be considered is the last day of the ten years, and that if land is not then required by the company it is superfluous, although at a previous time it may have been required, or although at a subsequent time it may be required by them for the purposes of the undertaking. I agree with the view of the law as stated in the House of Lords in *Great Western Ry. Co.* v. *May* (1), even if that case did not bind us as the decision of a higher tribunal. In the present case it is necessary to consider the meaning of the words "required for the purposes thereof" in the introductory portion of s. 127. Land is "required" by a railway company where they have actually used it for laying down the rails over which the trains carrying their traffic pass and repass, or for erecting works necessary in conducting their business. I think also that land is "required" where, although it is not at the moment used by the company, it will be wanted within a definite and ascertained time. I will give an illustration of what I mean: Suppose that in this case during July, 1863, a contract had been entered into for the commencement in the September following of works upon the land in dispute, and that the contract was bonâ fide and was not colourable, and was not entered into for the purpose of saving the forfeiture, and that the works contemplated were really wanted for the purposes of the railway: is it not clear that in that event the land would, on the 3rd of August, 1863, be "required for the purposes of the undertaking"? If it were held that the land was not "required," the absurd consequence would follow, that if the works had been commenced upon the 1st of August, the land would not be superfluous, but that it is superfluous because they are not begun until September, even although the commencement of them has been postponed merely to suit the convenience of the contractor who has undertaken to execute

(1) Law Rep. 7 H. L. 289, per Lord Cairns, L.C., at p. 294.

them. I cannot think that the land would vest in adjoining owners by reason of a delay on the part of the contractor. I am satisfied therefore that the expression "required for the purposes thereof" includes at least two classes, namely, lands actually in use on the day with respect to which the matter is to be decided, and also lands which are on that day within a definite and ascertained time intended to be used for the purposes of the railway company. But I think that there is also a third class of cases where land may properly be said to be "required" for the purpose of the undertaking, that is to say, where at the expiration of the period the land, although not in actual use, will be, owing to the growing traffic of the line, wanted for the railway within a reasonable time, which it is not possible to specify. I do not profess to give a precise definition of the class of cases to which I am now alluding, and I wish to remark that I do not think any land is "required" for the purposes of an undertaking merely because some person may be found to say that very likely at some time it may be wanted; but suppose that persons of competent skill can bonâ fide say that although the land is not at the moment wanted for the railway, and although it is not possible to fix a time when it will be, yet at some future time, perhaps five or six years, it assuredly will be wanted; in that case I think that the land is required for the purposes of the undertaking. If the argument for the plaintiffs were correct, adjoining owners would become entitled to land which had been covered with sidings unless those sidings were necessary for the then existing traffic of the railway; it would not be enough for the company to urge that the sidings had been made in order to provide for traffic which at some time would assuredly be created. The adjoining owners might claim the land because the sidings on it were not then wanted, and even if the company used them, the adjoining owners might still successfully contend that the use was not bonâ fide, but only colourable, in order to save a forfeiture under these sections. I think it would be a hardship upon a railway company if they were not allowed to retain land for which they have no immediate use, and which they do not expect to use within a definite and ascertained time, but which they will certainly use at some future and reasonable time. It must be borne in mind that

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when land has once vested in adjoining owners, a railway company may find it very difficult, if not impossible, again to become owners of it; and therefore an estimate ought to be made in their favour, not only of the present, but also of the future, state of the traffic. In order to make myself clear, I will say that in my opinion land will vest in adjoining owners at the end of the limited period, although at some subsequent time a new railway is unexpectedly constructed, forming a junction with the old railway, which would have rendered the retention of the land by the old company desirable for the purposes of their undertaking; for if this were allowed to be done, there would be a difficulty in saying that any piece of land would not at some future time be required. But, for the reasons which I have before given, I think that there is a third class of lands "required for the purposes" of the undertaking.

Having arrived at this conclusion as to the meaning of s. 127 and those which follow, I wish to make one remark before proceeding further. It has been forcibly argued for the plaintiffs that the sole object of mentioning a period of years in s. 127 is that the company shall within that period ascertain what lands are superfluous, and it is contended that the time for that purpose cannot under any circumstances be extended. I do not think that this is quite the correct construction of the section; for upon referring to the words of s. 127, it will be found that the promoters are to sell and dispose of the superfluous land, so that the period specified is given, not merely to ascertain what lands are superfluous, but also to allow the company to sell and dispose of such lands as may be superfluous.

Then the next question to be considered is whether the land sought to be recovered upon the 3rd of August, 1863, fell within any of the classes which I have mentioned. It certainly was not within the first class, for it was not then used for the railway or for the works thereof. And I think that we should draw an erroneous inference if we were to hold that it fell within the second class; for upon the 3rd of August, 1863, it could not then be said that it would be wanted within a definite and ascertained time. The question, therefore, is reduced to this, whether the land in dispute fell within the third class, which I have endeavoured to describe, that is to say, whether it was land which, as competent

persons might have foreseen, would be wanted at some future uncertain but reasonable time for the purposes of the railway. I confess that I have felt very great difficulty as to what answer ought to be given to this question; for we are called upon by the defendants to hold that the land sought to be recovered was, on the 3rd of August, 1863, required for the purposes of the special Act, and although at the commencement of this action almost twelve years had elapsed from that date, the land in dispute, or at all events some portion of it, had never been applied to any use connected with the traffic of the railway. This is a consideration which, as a matter of fact, is deserving of very great weight. But we must deal with the case as it has been presented to us, and it is found as a fact by the arbitrator that "since the year 1868 the railway traffic at the Westbury Station has very much increased, and during that period of time the three pieces of land have been and still are required for the purpose of constructing additional sidings upon them to accommodate the increased traffic." It seems to me that we are bound to consider this case as though this was the year 1868, and as though the Great Western Railway Company had in that year laid down additional sidings and were making use of the land. If the argument for the plaintiffs were well founded, it would follow that although the Great Western Railway Company had in 1868 covered the three pieces of land with sidings for the purposes of the railway, still this would have been land which in 1863 was superfluous. But Mr. Justice Mellor and Mr. Justice Manisty, who decided this case in the Queen's Bench Division, and who had power to draw inferences of fact, have come to the conclusion that the land in dispute was, upon the 3rd of August, 1863, required for the purposes of the undertaking. Ought we to say that these learned judges were wrong, and to lay down that these three pieces of land cannot fall within the third class of lands "required" which I have endeavoured to describe? However much I may feel embarrassed by the length of time which has elapsed without constructing the sidings, I cannot say that their judgment is wrong; and as I cannot say that the judgment of the Queen's Bench Division is wrong, I must hold that in this Court it ought to be affirmed. I wish to add that this part of my judgment is founded upon what I consider to be the

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correct interpretation of what was laid down in *Great Western Ry. Co.* v. *May* (1) by Lord Cairns, L.C., and Lord Hatherley when that case was before the House of Lords, and by Cockburn, C.J., and Blackburn, J., when it was before the Court of Queen's Bench. (2)

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I have further to remark that even if the three pieces of land were superfluous, in my opinion the mines and minerals would clearly belong to the Great Western Railway Company, because they at all events have not been acquired under the "provisions" of the Act. The mines and minerals were conveyed by the same deed as the surface; and it was ingeniously suggested for the defendants that because the mines and minerals were not acquired under the provisions of the special Act the surface was not; but this argument seems untenable, for the mines are severable from the surface, and the circumstance that the whole was conveyed by one deed will not prevent the surface from being acquired under the "provisions" of the special Act, although the mines were not; therefore the surface may become superfluous land, although the mines cannot. But in any point of view as to the construction of s. 127, the Great Western Railway Company would be entitled to keep the mines.

It is possible that this case may go before a higher tribunal, and therefore I think it right to express my view as to the other points which have been raised. I am of opinion that as to the piece of land No. 3, the plaintiffs are not shewn to be adjoining owners. I am satisfied that we are not to take into account for this purpose the land belonging to them, which lies upon the other side of the railway. Under the Lands Clauses Consolidation Act, 1845, s. 128, (3) before superfluous lands can be disposed of, they are to be offered to the person then entitled to the lands from which they were originally severed. The plaintiffs were in 1863 the owners of the lands upon the north-west side of the railway, from which the land sought to be recovered was originally severed, and it has been argued that because they would have been entitled to the right of pre-emption, the plaintiffs are adjoining owners of the lands in dispute. That is an argument to which I cannot assent.

(1) Law Rep. 7 H. L. 283. (2) Law Rep. 7 Q. B. 364.
(3) See ante, p. 271, n. (2).

I will now refer to the road upon the south-east side of the piece of land No. 3; as it was set out under an award made by commissioners appointed by an Act of Parliament, the soil does not belong to the plaintiffs even where their land abuts upon it; and I think no weight ought to be attached to the contention that because the plaintiffs are, by virtue of 41 Geo. 3, c. 109, s. 11, entitled to the grass and herbage upon the road opposite their land, they are adjoining owners. The soil of the road was vested in the lord of the manor at the time when it was set out, and is now vested in those who represent him, and it seems to me that the adjoining owners of the piece of land No. 3 are the precentors of Sarum, and the owners of the soil of the roads which bound it on its south-east and south-west sides.

With respect to the piece of land No. 1, no doubt the plaintiffs were adjoining owners, and therefore if it was forfeited the plaintiffs would be entitled to a portion. But I cannot help thinking that the whole of No. 1 was in 1863 in actual use by the company, and that it would be extremely difficult to mark off any portion as being not in use on the 3rd of August, 1863. At the north corner was the cottage inhabited by the company's servant; in the middle was the reservoir, with the pipes leading from it to the well; the company also would be entitled to a margin for the station road, and it might be very inconvenient to be without direct access from the cottage to the reservoir. Under these circumstances I think that the whole of the north end of No. 1 was in 1863 used by the company; but these considerations do not apply to the south end which lies beyond the reservoir, and if it were not for the following consideration it might be questionable whether it could be said to have been used by the company in that year. It is found in the special case that the reservoir was bonâ fide used for the purposes of the railway, and it was supplied by the natural drainage of the surrounding land. Possibly the company would not have bought the south end of No. 1 merely for the purpose of allowing the drainage from it to flow into the reservoir, and that even if they had bought it they might be willing to sell it for a good price, because, in order to make up the deficiency in the supply of water to the reservoir, they might sink another well; but it seems to me difficult to say that the south end

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was not used for the purposes of the railway. When a thing is said to be "required" for the purposes of a railway, it is not meant that no equivalent or substitute for it can be found, but it is meant that the thing is or will be at a future time useful for carrying on the traffic. In this point of view the company were in 1863 making use of the south end. It is true that they had let it to James Bourne for agricultural and farming purposes; but if he had stopped the flow of drainage into the reservoir, he would in all probability have received notice to quit. If the company had sold the south end, the new owner might have caused the drainage to flow away from the reservoir, and the company would have been at his mercy, unless they could have obtained an adequate supply of water by other means. I therefore am strongly inclined to hold that the whole of the piece of land No. 1 was in 1863 in actual use for the purposes of the railway.

I have already said the defendants are entitled to judgment in the action on the main question, namely, that in 1863 the three pieces of land were required for the purposes of constructing additional sidings, and I repeat that in my opinion the judgment of the Queen's Bench Division ought to be affirmed, because Mr. Justice Mellor and Mr. Justice Manisty have drawn inferences which I cannot say are erroneous.

BRETT, L.J. I also am of opinion that our judgment ought to be for the defendants.

In order that the plaintiffs may succeed in this action, they were bound to shew that on the last day of the ten years the land sought to be recovered, or some part of it, was superfluous within the meaning of the Lands Clauses Consolidation Act, 1845, s. 127, and also that they were adjoining owners. As it seems to me, this result flows from the judgment in *Great Western Ry. Co.* v. *May* (1), and in that case Lord Cairns (p. 292) states his view as to the meaning of the term "superfluous land," and points out that, as appears from the introductory portion of s. 127, its synonym is land acquired by the promoters of the undertaking "under the provisions of this or the special Act or any Act incorporated therewith, but which shall not be required for the purposes thereof."

(1) Law Rep. 7 H. L. 283.

The plaintiffs, therefore, undertook to shew that the lands sought to be recovered were acquired by the promoters of the original undertaking under the provisions of the Lands Clauses Consolidation Act, 1845, or their special Act: this proposition was denied by the defendants upon several grounds. It was contended upon their behalf that the land in question was purchased for extraordinary purposes under ss. 12, 13 of the Lands Clauses Consolidation Act, 1845, and s. 45 of the Railways Clauses Consolidation Act, 1845, and that land purchased for extraordinary purposes cannot be considered as land acquired by the promoters of the undertaking under the "provisions" of those Acts or the special Act. It seems to me that lands purchased for extraordinary purposes may be properly said to have been acquired under the provisions of those Acts and the special Act; but that, owing to the very words of the Lands Clauses Consolidation Act, 1845, ss. 12, 13, it is at the very least doubtful whether they can be deemed to vest in the adjacent owners at the expiration of the specified time, or to be subject to the right of pre-emption. This is a matter which, in my opinion, it is unnecessary to determine now, because, upon referring to the facts as found in the case, it is plain that the land sought to be recovered was not purchased for extraordinary purposes. It was further contended that if the land sought to be recovered was not purchased for extraordinary purposes, it was, at all events, not acquired under the "provisions" of the Lands Clauses Consolidation Act, 1845, or the special Act, because no notice to treat was given. I do not agree with this contention. It was included in the plans and books of reference deposited with the clerk of the peace, and although it was acquired by agreement with the owners, it was plainly acquired for the purposes of the undertaking, for it was part of a plot of land conveyed by one indenture, and upon other portions of that plot the line and station now belonging to the Great Western Railway Company have been constructed. The necessity for the notice to treat arises only when the company are driven to avail themselves of the compulsory powers, and it may be dispensed with where the company, after their special Act has been passed, can obtain land by agreement with the owner: nevertheless, even in this case, it is the statutes, and the statutes

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alone, which enable the company to take the land for the purposes of the railway; and therefore, although in the present case there was no notice to treat, it seems to me plain that the land was acquired under the "provisions" of the Lands Clauses Consolidation Act, 1845, and the special Act. Upon this question, as well as upon the question as to land purchased for extraordinary purposes, the plaintiffs are entitled to succeed.

I will now consider the further argument advanced on behalf of the defendants, that the land sought to be recovered was on the last day of the ten years required for the purposes of the undertaking. In *Great Western Ry. Co.* v. *May* (1), Lord Cairns, L.C., after pointing out that the legislature has fixed a period of time at which a survey is to be made of the condition of a railway, proceeds to say: "Can you at that moment of time thus indicated by Parliament predicate of any land in the occupation of a railway company that it is at that moment superfluous land"? The argument on the part of the plaintiffs was in effect that the meaning of the words "can you at that moment of time predicate," in the passage which I have read, is, "could the officers or directors of the railway company, and did they at that moment, predicate"? I cannot assent to this: in my opinion the real meaning is: can the tribunal which has to try the case say at the time when the case is tried that, if all the facts existing on the last day of the ten years had been known to a reasonably skilful and careful person, he would have said at that time that the lands in question would, by the ordinary development of the railway or neighbourhood, be required to be actually applied to the purposes of the railway within a reasonable time? And in order to enable the tribunal which is trying the case to determine that question, they have a right to receive evidence of facts which have become known since the last day of the ten years. I guard the proposition which I have laid down by the phrase, "ordinary development of the railway or neighbourhood;" and my reason is, that those facts, which arise after the last day of the ten years, and which are not the ordinary development of the railway or neighbourhood, must not be taken into consideration; for instance, suppose that after the last day of the ten years and before the trial of the case some

(1) Law Rep. 7 H. L. 283, at p. 294.

great manufactory be established in the neighbourhood, which would bring a large population and cause the alleged superfluous land to be wanted for the increased traffic: this circumstance must not be taken into account, because it could not at the end of the ten years have been foreseen as an ordinary development of of the railway: again, if an Act authorizing the construction of a new railway were after the expiration of that period to be obtained by a new company, and the existing railway were to run into it at a junction by passing over the land alleged to be superfluous, that would be an accidental matter not to be taken into account. Nevertheless the proposition which I have mentioned must be applied to the case before us. Upon the findings it is plain that in the year 1868 not only was the land in question actually required for the purposes of the railway, but also the necessity was present to the minds of the officials of the railway. In 1863 the attention of the officials had not been drawn to the advisability of constructing sidings upon the pieces of land; but as this circumstance existed in 1868, it is a piece of evidence fit to be laid before us. Since 1868 nothing has been done owing to the lack of funds. This seems to me the result of the findings according to the ordinary mode of construing a special case. The question is, what has the tribunal trying the case the right to infer as to the facts existing in 1863 from the facts proved to exist in 1868? There are considerations on both sides, which the tribunal would be bound to take into account. There were the circumstances that from 1863 to 1868 nothing was done, and that from 1868 to the commencement of this action, and, so far as appears, down to the present time, nothing has been done; there was the circumstance that the land sought to be recovered was of such large size that it seems strange that the whole of it should be required for the purposes of the railway. All these circumstances were pieces of evidence in favour of the plaintiffs; but then in 1868 the land was wanted for the purposes of the undertaking, and the advisability of using it was present to the minds of the officials. It is true that the three pieces of land had been let to James Bourne as tenant from year to year, and they were used solely for agricultural and farming purposes; but the agreement contained a power to resume possession upon notice. There-

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fore some circumstances existed which favoured the view for the plaintiffs, and others existed which favoured the case for the defendants, and, as appears from the judgment of Mr. Justice Manisty, the judges in the Queen's Bench Division took them all into consideration, and came to the conclusion that if in 1863 all the facts had been known, it might have been said that owing to the ordinary development of the railway and neighbourhood the land sought to be recovered would be wanted for the purposes of the undertaking within a reasonable time. Can we say, upon a review of the facts stated in the special case, that the decision of the Queen's Bench Division is wrong? I am of opinion that we cannot say that it was wrong, and therefore I think that we ought not to overrule it. So far from thinking the decision wrong, I incline to think it right. This determines the whole question in favour of the defendants; but I agree with Lord Justice Bramwell that, as the case may go before a higher tribunal, we ought to express an opinion upon some subsidiary points. I agree that although the surface of the land sought to be recovered, or even although the land without the minerals might in 1848 be "required" for the purposes of the undertaking, the mines were not so required, and therefore, in any point of view, the plaintiffs could not recover as to them.

I will now proceed to consider the question whether the plaintiffs can be deemed to be adjoining owners of the land sought to be recovered. They are owners of the land lying upon the north-west side of the railway; but I do not think this circumstance renders them adjacent owners of the land in dispute. The plaintiffs' land is separated by the railway from the land sought to be recovered, and it is the railway company who upon the north-west side are the adjoining owners. I say nothing as to whether the plaintiffs might not have been entitled to the right of pre-emption in respect of their land situate on the north-west side of the railway. Then I do not think that they can be deemed adjoining owners to the piece of land No. 3 in respect of their piece of land lying to the south-east of it, for they are in no sense the owners of the intervening road. It was a highway set out by an award made under parliamentary powers: the plaintiffs may have rights of pasturage over the road, but they were not owners of the soil of the road. The right to the soil of

the road was originally in the lord of the manor, and remains in his representative, and if the public right of way were extinguished, his representative would become entitled to all the benefits arising from his ownership. Therefore the plaintiffs in no point of view are adjacent owners of the piece of land No. 3. As to the piece of land No. 1, I think that they are adjacent owners; but, apart from the question whether No. 1 is wanted for sidings, I feel great difficulty in saying that No. 1 is not wanted for the purposes of the undertaking: it is a question, however, as to which I will give no decision.

Upon the findings of the arbitrator, and upon the decision of the Queen's Bench Division, we are bound to say that it is not proved that any part of the land was superfluous upon the last day of the ten years.

COTTON, L.J. This case has been fully dealt with by the Lords Justices, and therefore I will express my opinion merely as to the most material points which have been raised before us.

The plaintiffs allege that the land sought to be recovered has become vested in them as owners of adjoining land under the Lands Clauses Consolidation Act, 1845, s. 127; upon the question whether their land is adjoining land, I need not add anything to what has been already said, but for the purposes of my judgment I will assume that they are adjoining owners, and will proceed to consider whether the land sought to be recovered has vested in them. It is for the plaintiffs to make out that this land has been "acquired by the promoters of the undertaking under the provisions of this or the special Act or any Act incorporated therewith," and that it is not "required for the purposes thereof." It was argued for the defendants that it was very reasonable that this section should apply to lands taken compulsorily, but that it ought not to be extended to lands taken by agreement. I cannot agree with that contention, if by "lands taken by agreement" are meant lands which could have been taken under the compulsory powers, but which in fact were not so taken. It is well known that a large portion of the land which a railway company are entitled to take under their compulsory powers is in fact not so taken; but the owner of the land, knowing that

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the compulsory powers can be put in force, prefers to dispose of it to the railway company by treaty. It would have been easy to begin s. 127 with the words "and with respect to lands acquired under the compulsory powers," if the legislature had intended to limit its operation in the manner suggested on behalf of the defendants. I take it that the section extends to all lands acquired by agreement, if they are lands which the railway company might have taken under their compulsory powers, although their owner was unwilling to part with them. Various cases were referred to for the purpose of shewing that s. 127 bears only the limited construction contended for on behalf of the defendants, but no decision to that effect is to be found. At first sight *City of Glasgow Union Ry. Co.* v. *Caledonian Ry. Co.* (1) may appear to support the argument for the defendants, but that case really turned upon the provisions of the Lands Clauses Consolidation (Scotland) Act as to lands purchased for extraordinary purposes, which are very similar to those contained in ss. 12 and 13 of the English Act. No doubt some remarks are made in the judgments delivered in the House of Lords which appear to favour the contention for the defendants, but it must be recollected that they were uttered with reference to the facts before the House, and that it was intended to point out that lands purchased by agreement for extraordinary purposes do not vest in adjoining owners: I cannot think that it was intended to lay down that lands which might have been taken compulsorily cannot become superfluous, if they have been conveyed to the company pursuant to an agreement. And I think that the defendants fail to establish that the land sought to be recovered was purchased for extraordinary purposes; in my opinion it was acquired for the purposes of the undertaking which were directly contemplated by the special Act.

Then comes the question whether these lands were "required" for the purposes of the undertaking. I agree with the arguments for the plaintiffs that the material period to be considered is the expiration of the ten years. It was contended on behalf of the plaintiffs that in order to prevent the application of s. 127 the land must be in actual use at that time. I cannot accede to that proposition; it may be true that if the purpose for which the land

(1) Law Rep. 2 H. L., Sc. 160.

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was originally acquired has come to an end, it is superfluous; but in order to defeat the operation of the section it is not necessary that the land should be in actual use for the purposes of the railway; to my mind it is quite sufficient if, having regard to the ordinary development of the railway, it may be reasonably said of the land that it will be required for the purposes of the undertaking. In my opinion it is not necessary that anything should be done at the expiration of ten years by the railway company expressing their opinion that the land is wanted; if without proper grounds they came to a determination that the land was wanted, that determination would not save the land from being forfeited, and the want of such a determination as this in the present case is not decisive against the railway company. The question of fact, whether the land is or is not required at the expiration of the ten years for the purposes of the undertaking, must be decided by the tribunal before which the right to the land is contested by adverse litigants, and that tribunal, although it must pronounce its decision with respect to the facts as they existed at the period, may take notice of what has subsequently occurred; for instance, if the railway company had after the expiration of the ten years put up the land for sale as superfluous land, that circumstance would, in my opinion, be almost decisive against them; and this seems to have been the view of Lord Blackburn in *Moody* v. *Corbett* (1); and if circumstances which tell against a railway company may be looked at, in like manner those may be considered which seem to be in their favour. In the present case the plaintiffs have elected not to prosecute their claim as adjoining owners until after some circumstances happened, which would not have been before us if they had taken proceedings at an earlier time; but as these circumstances have come into existence, they may be considered by the tribunal which has to decide whether the land is or is not superfluous.

This being the principle upon which we are to proceed, I will review very briefly the facts in the case before us. It appears that the land has been let in 1819 for agricultural and farming purposes, and in 1871 for mining purposes; but this circumstance

(1) 5 B. & S. 859, at p. 880; 34 L. J. (Q.B.) 166, at p. 174; in Ex. Ch. Law Rep. 1 Q. B. 510.

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is not against the defendants, for in either case power was reserved to the company to resume possession upon giving a short notice. No doubt by the demise in 1871 the iron company was enabled to take a part of the inheritance, but without the minerals the land is just as useful for the railway as it is with them: it is the surface and the soil which the railway company want, and it is a fallacious argument that the grant of the minerals by the company entitles the adjoining owners to say that by getting the minerals the surface and the soil fall within the description of superfluous land. It is found as a fact in the special case that the land sought to be recovered has been required for the purpose of constructing additional sidings, and that the officials have frequently discussed the want of more accommodation; it is true that no additional sidings have been constructed up to the present time, but this circumstance is explained by the circumstance that the company have been expending large sums of money upon other works. Therefore evidence existed, which was fit to be laid before a jury, for the purpose of shewing that on the 3rd of August, 1863, it might have been reasonably said in respect of the land sought to be recovered that by the ordinary development of the traffic the land would come to be wanted for the purposes of the railway. Therefore, I am not prepared in any way to dissent from the conclusion at which the Queen's Bench Division have arrived, with respect to the facts stated in the special case.

Judgment affirmed.

Solicitors for plaintiffs: *Field, Roscoe, Field, Francis, & Osbaldeston.*

Solicitor for defendants: *R. R. Nelson.*

BENTHAM, APPELLANT; HOYLE, RESPONDENT.

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Railway Company—Bye-law, Validity of—Travelling in Carriage with Ticket of Inferior Class—8 Vict. c. 20, s. 103.

4 QBD. 3
7 QBD 52
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By 8 Vict. c. 20, s. 103: "If any person, having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare . . . . and with intent to avoid payment thereof, he shall for every such offence forfeit 40s." By s. 108: "The company, subject to this and the special Act, may make regulations for regulating the travelling upon or using and working the railway." By s. 109: "For better enforcing the allowance of all and any of such regulations, it shall be lawful for the company subject, &c., to make bye-laws . . . . provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom, where the same are to have effect, or to the provisions of this or the special Act." By a bye-law made under the above Act "any person travelling without the special permission of some duly authorised servant to the company, or by a train of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding 40s., and shall in addition be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally started, unless he shews that he had no intention to defraud."

The appellant was convicted in a penalty of 10s. under this bye-law for travelling in a first-class carriage with only a second-class ticket; but it was found as a fact that he had no intention to defraud the company:—

Held, that the conviction must be quashed, for without deciding whether the bye-law did or did not make proof of the absence of fraudulent intention an exemption from the penalty as well as from the extra fare, it was, if it made the fraudulent intention immaterial in the case of the penalty, repugnant to 8 Vict. c. 20, s. 103, and ultrà vires the company.

CASE stated by justices of Lancaster under 20 & 21 Vict. c. 43.

On information preferred by J. B. Hoyle, ticket collector, on behalf of the Lancashire and Yorkshire Railway Company (the respondent), against W. Bentham (the appellant), charging that the appellant, on the 12th of April, 1877, unlawfully did travel on the Ramsbotton and Bacup line of the company, without permission, in a carriage of a superior class to that for which he had obtained a ticket, by travelling from Stacksteads to Bacup in a first-class carriage, he (the appellant), having then only a ticket for a second-class carriage, contrary to the 8th bye-law of the company and the statute; the appellant was convicted in the mitigated penalty of 10s. and costs.

The appellant is the holder of a second-class ticket between Bacup and Manchester, available at intermediate stations.

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The appellant on the day in question got into a first-class carriage in company with his daughter, who had a first-class ticket from Stacksteads to Bacup, and passed through the Bacup station without shewing his ticket or tendering the difference between the first and second-class fare, namely, one penny.

It was found as a fact that the appellant had no intention to defraud the company.

12. It was contended on behalf of the respondent that the bye-laws constituted by inference two distinct offences and two penalties, viz.: (1st offence), that of a person travelling without permission in a superior class of carriage to that for which his ticket was issued, where the person so travelling had no intention to defraud: and (2nd offence), that of a person doing the same thing with an intention to defraud: and (1st penalty), a sum not exceeding 40*s.*: and (2nd penalty), in addition to a penalty not exceeding 40*s.*, the liability to pay the fare from whence the train started, and whilst it was admitted that the appellant could not be liable to pay the fare from whence the train started, unless there was intention to defraud, yet it was urged he was subjected to a penalty not exceeding 40*s.*, though he had no intention to defraud, and that the words at the end of the bye-law, "unless he shews that he had no intention to defraud," were applicable only to the latter part of the bye-law.

13. On behalf of the appellant it was contended that the bye-law only created one offence in which the intention of the person was made an essential ingredient.

14. It was further contended on behalf of the appellant that, if the construction sought to be put upon this bye-law by the respondent was the literal and correct one, the bye-law had the effect of making that an offence without any intention to defraud, which the Act only makes an offence when the intention to defraud exists, and therefore the bye-law would be "repugnant," within the meaning of 8 & 9 Vict. c. 20, s. 109, (1) and ultrà vires, and that

(1) By 8 Vict. c. 20 (The Railway Clauses Consolidation Act, 1845), s. 103: "If any person travel or attempt to travel in any carriage of the company, or of any other company or party using the railway without having previously paid his fare, and with intent to avoid payment thereof, or if any person having paid his fare for a certain distance knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying

the bye-laws could only be used for carrying out the Act, and not going beyond it.

15. The justices were of opinion that the construction of the bye-law contended for on behalf of the respondent was the correct one, and that the appellant was legally liable to a penalty not exceeding 40*s.*, notwithstanding that they found as a fact that he had no intention to defraud, and gave their determination against the appellant as before stated.

16. The questions for the opinion of the Court are:—

1. Whether or not the construction put upon the bye-law on behalf of the respondent is the correct one;

2. If it be the correct construction, is the bye-law bad as being ultrà vires or on any other ground?

Besley, for the appellant. *Dearden* v. *Townsend*, (1) is undistinguishable from this case. There, though it became unnecessary to decide the point, the Court expressed a strong opinion that a

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the additional fare for the additional distance, and with intent to avoid payment thereof, every such person shall for every such offence forfeit to the company a sum not exceeding forty shillings."

By s. 108: "It shall be lawful for the company from time to time, subject to the provisions and restrictions in this and the special Act contained, to make regulations for the following purposes... for regulating the travelling upon, or using and working of the said railway."

By s. 109: "For better enforcing the observance of all or any of such regulations, it shall be lawful for the company, subject to the provisions of 3 & 4 Vict. c. 97, ss. 8, 9, to make bye-laws and from time to time to repeal and alter such bye-laws and make others, provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act, &c. . . . . and any person offending against any such bye-law shall forfeit for every such offence any sum not exceeding five pounds to be imposed by the company in such bye-laws as a penalty for any such offence."

The Lancaster and Yorkshire Railway Company made bye-laws accordingly the 8th of which is as follows:—

"Any person travelling without the special permission of some duly authorized servant to the company in a carriage or by a train of a superior class to that for which his ticket was issued is hereby subject to a penalty not exceeding forty shillings, and shall in addition be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally started, unless he shews that he had no intention to defraud."

(1) 1 Law Rep. Q. B. 10.

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bye-law which made it an offence to travel without a ticket, irrespective of the intention to defraud, was repugnant to 8 Vict. c. 20, s. 109, and illegal. Here it is expressly found that there was no intention to defraud. The power to make bye-laws is only for the purpose of promoting the execution of the Act, and not to enable railway companies to create new offences. To divide the bye-law into paragraphs in the manner contended for by the respondent, so as to create two offences, and two penalties, would be most inconvenient, and calculated to mislead the public, but even if this construction were right, it would make the first paragraph unreasonable and invalid for the reasons already mentioned.

E. Clarke, for the respondent. *Dearden* v. *Townsend*, (1) contains no decision upon the validity of any bye-law, but only an expression of opinion. The present case involves two questions: first, can the bye-law be divided so as to confine the words as to the intention to defraud to the latter part, and if it can, is the earlier provision invalid? Having regard to the punctuation, and the reason of the matter, it must be taken that the words as to the intention to defraud do not apply to the whole of the bye-law. A man who contravenes the regulations innocently is fined 40*s*., but where there is an intention to defraud, the fine is 40*s*. plus the fare from the point where the train started. Then if this construction be the right one, there is nothing in 8 Vict. c. 20, to make the provision illegal. It is not repugnant to the provisions of the Act, it merely carries them a little further, and not being repugnant to the Act, the question whether it is a reasonable exercise of the power is for the Board of Trade when they are asked to sanction it.

[COCKBURN, C.J. The power of this Court to inquire into the validity of such a bye-law can only be taken away by express enactment.]

This can only be where the bye-law is clearly in excess of the power to make it.

COCKBURN, C.J. I think this conviction cannot stand, and must be quashed. It seems to me that Mr. Clarke is on the horns of a dilemma: either the last words of the bye-law which have been

(1) 1 Law Rep. Q. B. 10.

cited,—which say that the passenger shall be liable to pay the fare according to the class of carriage in which he is travelling from the station whence the train originally started, unless he shews that he had no intention to defraud—apply to all that goes before, namely, to the penalty to which the man is subjected, as well as to the liability to pay the fare in addition from the station from whence the train originally started, or the bye-law is unreasonable. If the words apply to all that go before, they apply to the penalty attached to the offence of which the appellant has been convicted, and for which the 40*s.* penalty has been imposed, because it is found as a fact—and it is immaterial whether he has proved it himself or whether it appeared aliunde in the course of the proceedings, although the burden of proving it is cast upon him (as to which there may be a question whether it is competent for the company to cast that burden on him)—that he did not intend to defraud the company, and therefore he is within the qualifying terms in the last part of the section. If, however, those words do not apply to the whole, but apply only to the second branch of the bye-law, upon which I confess I am somewhat disposed to think that, according to the true canon of construction, Mr. Clarke is right, if that is so then I say the bye-law is an unreasonable one, and I say this for two reasons. When the bye-law deals with offences and inflicts a penalty, there must be in point of reason a mens rea to warrant the charging people with offences and convicting them on such charges, in addition to the offences under the Act of Parliament. The Act, although it gives the company power to make bye-laws, and makes the observance, or rather the non-observance of those bye-laws, the subject of penalties, cannot have intended to leave it to the company to make bye-laws in respect of matters where the legislature itself has taken the initiative, and has superseded the necessity of making any bye-law by a statutory enactment applicable to the very case in respect of which the company have taken upon themselves to make a bye-law. The 103rd section includes this very case, and makes the offence subject to the condition of an intention on the part of the party travelling to avoid payment of the fare. Then it imposes a penalty not exceeding 40*s.*, which is the penalty the company have attached to their bye-law. I think

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that is an indication on the part of the legislature of what they intended should constitute the offence, and it is not competent for a railway company to alter the nature and character of the offence, and to say that this is a reasonable exercise of the power to make bye-laws intrusted to them by the Act. Therefore, if those qualifying words do not govern the whole of the bye-law in question, then the bye-law is inconsistent with the Act of Parliament, and therefore unreasonable and ultrà vires. The legislature cannot have intended, while it was legislating with reference to the very case under consideration, to give the company, when it gave that power to make bye-laws, a power to supersede the Act and make that an offence which the legislature did not. Quâcunque viâ, the conviction is bad.

MANISTY, J. I am of the same opinion. I think the conviction cannot be supported, and it is unnecessary to decide whether or not those words, "unless he shews he had no intention to defraud," are applicable to the whole of the bye-law. I confess I do not entertain so strong a doubt as my Lord seems to entertain as to whether or not they do, because it does seem to me that, as to paying the fare from the place of starting, he is to do that unless he shews he had no intention to defraud, and he is to be subjected to a penalty whether he intended to defraud or not. If it had been the other way I could have understood it—that he should both pay his fare from the place whence the train started, and also be subjected to a penalty unless he could shew that he had no intention to defraud. That would be something like sense and reasonable; but certainly I do not entertain so strong a doubt as my Lord; and it is unnecessary to say whether or not those words do override the whole clause. If they do not, then it seems to me the bye-law is unreasonable and void, and also having regard to the terms of the Act of Parliament, I think it is ultrà vires; but that it is unreasonable I think is beyond all doubt.

Judgment for the appellant.

Solicitors for appellant: *Shaw & Tremellen.*
Solicitors for respondent: *Clarke, Woodcock, & Ryland.*

[IN THE COURT OF APPEAL.]

PONTIFEX *v.* SEVERN. 1877

Practice—Reference under Judicature Act, 1873, *ss.* 56, 57—*Official Referee—Reference for Report—Reference for Trial.* *Dec.* 20.

The Court or a judge has no power under ss. 56, 57 to order an action to be referred to an official referee, for s. 56 only allows any question arising in a cause to be referred for inquiry and report, and the report may or may not be adopted by the Court; and s. 57 only allows any question or issue of fact, or any question of account, to be tried before an official referee if the parties consent in any cause, and if they do not consent, in any cause requiring a prolonged examination of documents or accounts, or any scientific or local investigation.

An official referee has no power to order judgment to be entered on any question referred to him under ss. 56, 57 of the Judicature Act, 1873.

THIS case is reported 3 C. P. D. 142.

THE GUARDIANS OF BARTON REGIS UNION, APPELLANTS; THE OVERSEERS OF LIVERPOOL, RESPONDENTS. 1878 *Jan.* 24.

Poor Law—Settlement—Order of Removal, how far conclusive—Change of Law pending Order of Removal—39 & 40 *Vict. c.* 61, *ss.* 35, 36.

An order for the removal of a pauper to the place of his birth settlement, confirmed by sessions subject to a case, was quashed on the ground that the facts shewed a settlement which the pauper derived from his grandfather. Between the order at sessions and the decision upon the case, the Act 39 & 40 Vict. c. 61, abolishing a derivative settlement, such as that above-mentioned, became law, and a fresh order for the removal of the pauper to the place of his birth settlement was made:—

Held, that such order must be quashed, for the quashing of the first order was a conclusive adjudication of a settlement of the pauper, inasmuch as the facts upon which it proceeded were unaltered, and its validity could not be affected by a subsequent change in the law, and further, because it must be taken to be an order "pending" at the date of the Act, and therefore under s. 36 excluded from its operation.

CASE stated on appeal to the Liverpool borough sessions under 12 & 13 Vict. c. 45, s. 11.

On the 15th of May, 1877, an order for the removal of the pauper John Davis from the respondents' parish to the appellants' union, was made by justices of the borough of Liverpool, and

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duly served on the appellants, together with the grounds of removal.

In 1810 an order for the removal of Richard Davis, the pauper's grandfather, was made by justices of Gloucester, adjudging that his last place of settlement was then in the parish of Bedminster, in the Bedminster union. This order was not appealed against. John Davis the pauper's father has acquired no settlement to the present time. On the 17th of November, 1842, the pauper was born in the appellants' union.

On the 30th of November, 1875, an order of justices was made for the removal of the pauper from the parish of Liverpool to the appellants' union (then known as the union of Clifton), as the place of his last legal settlement. In January, 1876, the Liverpool sessions upon appeal confirmed the order, subject to a case. On the 21st of April, 1877, the case came on for argument, when this Court held that the order for the removal of the pauper's grandfather was a conclusive adjudication of his settlement, and that the pauper's birth settlement having been superseded by his derivative settlement, the order for his removal must be quashed. (See *Reg.* v. *Clifton Union.* (1)

Subsequent to the making of the last-mentioned order of the said High Court of Justice as aforesaid, that is to say on the 15th of August, 1876, the Divided Parishes and Poor Law Amendment Act, 1876, was duly passed and came into operation.

The appellants affirm, and the respondents deny, that at the time of the passing and coming into operation of the Act, the order of the 30th of November, 1875, and the said order of sessions, and the order of the High Court of Justice made quashing the same respectively, are or one of them was a pending order of removal, within the true intent and meaning of the 36th section of the Act.

The respondents affirm, and the appellants deny, that under the circumstances of the quashing of the order of the 30th of November, 1875, at the time and in manner aforesaid, and of the passing and coming into operation of the Act, and of the pauper being chargeable to the respondent parish on the 15th of May, 1877, it was competent according to law for the justices making the same

(1) 2 Q. B. D. 456.

to make the order of removal of the 15th of May, 1877, and that the order of removal of the 15th of May, 1877, was and is a good and valid order of removal according to law.

The question for the opinion of the Court is:—Is the respondents' order of the 15th of May, 1877, under the circumstances above detailed, a valid order?

Charles, Q.C. (*H. D. Greene* with him), for the appellants. Even if the Act 39 & 40 Vict. c. 61 (1), contained no express provision on this subject, it would be contrary to principle to apply a new enactment so as to affect proceedings pending when it first became law. But s. 36 expressly provides that the provisions as to settlements are not to apply "to any pauper removed under any order of removal, . . . or in respect of whom any order of removal shall be pending at the passing of this Act."

Edward Clarke, for the respondents. In *Reg.* v. *Wye* (2), where an order for the removal of a pauper was made founded upon his derivative settlement from his father, and after the order had been confirmed on appeal, the marriage of the pauper's father and mother was declared void by sentence of the Arches Court, it was held that the order of removal was not conclusive, and might be quashed on proof of the nullity of the marriage. Secondly, the order of removal was not "pending" at the time of the passing of 39 & 40 Vict. c. 61, s. 36.

COCKBURN, C.J. I think this order must be quashed. The

(1) By the Divided Parishes and Poor Law Amendment Act, 1876, 39 & 40 Vict. c. 61, s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. . . . If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

Sect. 36: "The provisions relating to settlement shall not apply to any pauper removed under any order of removal . . . before the passing of this Act, . . . or in respect of whom any order of removal shall be pending at the passing of this Act."

(2) 7 Ad. & E. 761.

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order of the 30th of November, 1875, having been quashed by a judgment of this Court, this judgment is binding and conclusive as to the settlement unless the parties can discover some new state of facts which has arisen since the former decision. But it was never intended that the settlement of a pauper should be determined otherwise than by the law existing at the time the order for removal was made. It is a principle of universal application that litigation must be determined by the law existing when it commenced, and not by some new law enacted while the litigation is pending. Independently of this principle, we have the express words of the section that the alteration of the law introduced by the Act is not to apply to any order of removal pending when it came into operation. Mr. Clarke's argument would lead to the monstrous consequence that no settlement which has once been decided could not again be brought into question.

MANISTY, J. I am of the same opinion. I think that the legislature contemplated the state of facts which has arisen in this case, and that it was meant that any litigation between two parishes as to the settlement of a pauper should be determined by the law as it then existed.

Judgment for the appellants. Order of removal quashed.

Solicitors for appellants: *Gregory, Rowcliffes, & Rawle, for Benson, Bristol.*

Solicitor for respondents: *Sadler, for Bellringer & Cunliffe, Liverpool.*

LAING, APPELLANT; THE OVERSEERS OF THE TOWNSHIP OF BISHOPWEARMOUTH AND THE ASSESSMENT COMMITTEE OF SUNDERLAND UNION, RESPONDENTS. 1878 *Jan.* 24.

Poor-rate—Rating of Shipbuilding Premises—Machinery capable of being removed without Injury—6 & 7 Wm. 4, c. 96, s. 1.

In assessing shipbuilding premises to the poor-rate, the value of machinery attached to the premises is to be taken into consideration in ascertaining their rateable value where such machinery, though some of it may be capable of being removed without injury to itself or the freehold, is essentially necessary to the shipbuilding business to which the premises are devoted, and intended to remain permanently attached to them so long as they are applied to their present purpose.

CASE stated under 12 & 13 Vict. c. 45, s. 11.

In May, 1875, a rate of 12*d.* in the pound for the relief of the poor of the township of Bishopwearmouth, Durham, was duly made and allowed. In the part of the rate relating to the property of the appellant in the township he is named in the first and second columns as owner and occupier respectively, and the property is rated separately under the following four items:—(1.) Workshops, warehouse, and office. (2.) Shipbuilding yard, graving dock, quay, workshops, warehouse, machinery, land, cranes, and other plant. (3.) Shipbuilding yard, workshops, and drafting loft, offices, stables, cottage, land, machinery, plant, &c. (4.) Tenements gallery.

1. The appellant is the owner and occupier of extensive premises for building, fitting out, and repairing iron and wooden ships and vessels situate on the river Wear, in the township of Bishopwearmouth, and for manufacturing and repairing machinery for such ships and vessels.

2. The premises comprise several acres of land upon which are constructed the necessary shipways for building and launching iron and wooden ships, a large graving dock for repairing iron and wooden ships, and large and extensive workshops, warehouses, and other erections necessary to carry on the above trades.

In and upon such premises are certain valuable machinery and plant used for the purposes of the business.

3. No question arises as to the rating of a part of the premises

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rated, viz., the workshop, warehouse, and office, nor of the shipbuilding yard, graving dock, quay, workshops, warehouses, land, nor of the shipbuilding yard, workshop, drafting office, stables, cottage, and land, nor of the tenements gallery.

4. The question is whether the whole of the "machinery and plant," or any portion of such machinery and plant which is hereinafter described in detail, is rateable, or is to be taken into consideration in ascertaining the rateable value of the "premises."

5. The machinery and plant in question is divided into classes, mentioned in the appendix, but each of these classes is subdivided so as to shew the nature of the several machines, the purposes for which they are used, and further, in those cases in which the machines are attached to the freehold, the mode in which they are so attached; and in those cases in which the machines are not attached to the freehold, the mode in which they are fastened, so as to be available for the purposes for which they are used.

6. For the purpose of illustrating the nature of the questions which arise, the description of certain of the principal pieces of machinery has been extracted from the schedule contained in the appendix, and is contained in the twenty-four following paragraphs:—

Boilers.

7. There is a boiler 33 feet long by 4 ft. 6 in. in diameter, which is set in Ashlar masonry (lined with fire-brick) partially sunk in the ground. The steam-pipe from this boiler is carried overhead to an engine, and also to another engine, which is attached to a plate bending machine. There is a second boiler set in the same manner. Some of the pipes from these boilers are carried overhead to one engine, and others underground to another engine. They have also flues attached to them. There is a third boiler which stands on a cast-iron plate, which plate is sunk into the ground, but the boiler is not fixed in any way to the plate. The steam-pipes connected with this boiler are carried underground.

Engines.

8. There is a horizontal high-pressure engine weighing about six tons. The cylinders, motion bars, and some other parts of it are mounted upon a cast-iron bed plate. This plate is bolted to a stone foundation, which is partially sunk in the ground. The engine drives all the machinery on the east side of the high yard and in the joiners' shop.

A vertical high-pressure compound steam-engine weighing about ten tons. The cylinders and some other parts are mounted upon a heavy cast-iron pillar, which is bolted at the base to a large bed stone sunk in the ground, and at the

side to the mainwall of the building, and is fixed by bolts. This engine is provided with condenser, and with air and circulating pumps, which are fixed to a concrete foundation sunk into the ground, and are driven by a belt from the main shaft through a counter-shaft. This engine drives all the machinery in the low yard, excepting those described as having their own engines attached.

A pair of double cylinder vertical engines, bolted to one of the cast-iron columns which support the roof, and unattached to any foundation.

A portable engine with boiler, mounted on cast-iron wheels, so that it can be moved from place to place.

Shafting.

9. The main shafting is about 220 feet long, and is coupled direct to the crank shaft of the engine (No. 14 in Schedule); it is supported on bearings carried upon brackets bolted to the main wall of the building.

There is also a main shaft 210 feet long, carried upon bearings borne by and attached to the principals of the roof.

And another main shaft, 237 feet long, carried on bearings borne by brackets bolted to the cast-iron columns carrying the roof.

There are other lines of shafting in connection with the main shafts carried by bearings borne by brackets bolted to the girders.

Punching and Shearing Machines.

10. Three punching and shearing machines driven by their own engines, which are bolted to the main frames of the machine. The machines, which weigh 14, 12, and 17 tons respectively, have cast-iron frames and gearing. The two first stand upon wooden sleepers, the last upon a concrete foundation; both the sleepers and the said foundation being partially sunk into the ground. The first and third of the machines are attached by bolts to the sleepers and the foundation respectively.

Planing, Boring, and Slotting Machine.

11. Planing, boring, and slotting machine weighing 58½ tons, driven by its own engine. It is bolted to a cast-iron foundation plate. This foundation plate rests on a concrete bed sunk into the ground, but is not fixed thereto by any fastening.

Riveting Machine.

12. A riveting machine, weighing without boiler 18¾ tons, consisting of cast-iron frames and holder-up; the whole is bolted down to a concrete or brick foundation.

Punching and Shearing Machines.

13. Three punching and shearing machines, the first and second of which, weighing 14 and 10 tons respectively, stand on wooden sleepers partially sunk in the ground. The first is, but the second is not, fixed thereto; the third stands upon, and is bolted to, a wooden frame built into brickwork, forming a kind of pit, the machine itself being partially sunk in the ground. It is driven by a cross-shaft from the counter-shaft.

Lathes.

14. Four lathes; the first, weighing 34 tons, attached to a heavy cast-iron

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foundation plate, but having a movable headstock for the purpose of widening or narrowing the gap, the foundation-plate is bolted to a concrete foundation. The second is bolted to stone blocks partially sunk in the ground, the third is partially embedded in concrete, and the fourth rests on blocks of stone partially sunk in the ground, but is not attached thereto.

Drilling Machines.

15. Three drilling machines; the first is bolted to a stone block sunk into the floor, the second to a cast-iron column of the roof, the third to the cast-iron bed of one of the lathes.

Saw Benches.

16. A saw bench and bond saw; the first is mounted upon a wooden frame partially sunk into the ground, the second is fixed to the wooden floor of the shop.

Steam Hammer, Shearlegs, and Cranes.

17. The steam hammer is bolted to wooden foundation sunk in the ground.

18. The shearlegs, which with their engines weigh 40 tons, and are constructed to lift 80 tons, are bolted to a stone foundation in the quay wall; the back leg is traversed by a screw carried in a cast-iron frame, which is bolted to a concrete foundation sunk in the ground.

19. The cranes. The first and third are bolted to the wooden quay, and have cast-iron frame, gearing, and main post fixed in a cast-iron bed plate. The second has cast-iron frames fixed in a cast-iron sole plate, which is bolted to a wooden frame, and with others moves on a line of rails. The remaining cranes are bolted to stone blocks to the cast-iron columns of the roof, or to the main wall of the building, or to wooden main posts sunk in the ground. There is also a traversing crane, weighing 30 tons, carried on a pair of wrought-iron girders bolted to the iron columns supporting the roof.

Pumps.

20. Graving dock pumps, for keeping graving dock free from water, fixed to cast-iron box set in a wood frame sunk in the ground, and driven by bolt from counter-shaft.

Two donkey pumps mounted on cast iron bed plates bolted to stone blocks partially sunk in the ground.

Weighing Machines.

21. Two weighing machines, the first fixed in masonry sunk in the ground with brick house attached, the second is mounted on wheels.

Smiths' Shop.

22. A smiths' shop containing twelve fire-places with brick hearths partially sunk in the ground, and three furnaces constructed of brickwork also partially sunk in the ground and tied with iron tie rods and cast-iron plates.

Water Tanks.

23. Four water tanks, the first of cast-iron fixed on wooden pillars partially sunk in the ground; the second of wood placed on blocks of wood laid on the

surface of the ground; two others of wrought iron stayed to the main wall of the engine-building shop. These stand respectively on concrete and brick foundations, and are 35 feet and 50 feet in height, and 4 ft. 6 in. and 5 feet in diameter.

Grindstone.

24. A grindstone fixed to cast-iron columns of the roof by flat wrought iron stays bolted to the columns.

Railway.

25. A railway 230 yards in length laid with cast-iron chairs on wooden sleepers ballasted in the usual way.

26. In the above description, where machines are spoken of as being bolted to the foundations, or to the walls, roof, columns, or pillars of the buildings, such machinery could not be taken to pieces and removed without the nuts of such bolts being unscrewed or such bolts being extracted, but, except removing the bolts, the whole of the machinery could be removed without any disturbance or injury to the freehold, and when removed might be used in, and are suitable to be used in, any other similar mill or manufactory.

27. It is to be understood throughout the above descriptions that, except when fastenings and connections are stated, all the machines are retained in their places by their own weight merely. That before being connected as described, each of them, except the railway mentioned in paragraph 25, is a separate and complete article in itself known in the trade as such.

28. In the cases in which the machines are stated to rest upon or be bolted to stone, brick, wood, or concrete foundations, such foundations were specifically constructed for the purpose of receiving the said machines.

29. The whole of the buildings, foundations, engines, shafting, and other machinery included in the appendix, and hereinbefore referred to, were intended to be permanently used in the shipbuilding and repairing yard, the subject of the assessment, and are now used by the appellant for the purpose of building and repairing ships and vessels, and for manufacturing and repairing machinery for such ships and vessels, and are intended to be permanently used for such purposes.

30. The question for the opinion of the Court is, whether the machinery and plant hereinbefore mentioned and described, or any

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and what parts thereof are to be taken into consideration as in any way enhancing the rateable value of the hereditaments included in the assessment, and if any parts are to be taken into consideration as enhancing the rateable value, upon what principle are they to be valued, or rated, or taken into consideration?

The Court is to have power to draw any inference of facts.

The amount of the rateable value is to be ascertained by the parties upon the principles laid down by the Court.

J. Edwards, Q.C. (*Crompton* with him), for the appellant. A large proportion of the machinery in question ought not to be taken into account in calculating the rateable value. The boilers are not fixed to the premises with the intention of permanently adding to the value of the freehold. They may be taken away without injury to the whole structure. The planing machine, force-pump, saw-bench, &c., are only fastened for the purpose of steadying them. They are not affixed to the freehold. The boring machine may be disused at any time, and is for rateable purposes upon the same footing as an ordinary sewing-machine or a billiard table, which could not be considered as part of a house. The leading authorities upon the subject are not conclusive. In *Reg.* v. *Lee* (1) where gasworks were rated and their value ascertained with reference to the effective machinery, the articles were attached to the premises for the permanent improvement of them. In two subsequent cases: *Reg.* v. *Halstead* (2) and *Chidley* v. *Overseers of West Ham* (3), referred to in Browne on Rating, p. 383, the test is stated to be whether the articles are intended to be part of the land.

Herschell, Q.C. (*R. E. Webster*, with him), for the respondents. The authorities shew conclusively that the value of the machinery described in the case cannot be deducted from the rateable value of the premises: *Reg.* v. *Southampton Dock Company* (4); *Reg* v. *North Staffordshire Ry. Co.* (5); *Staley* v. *Castleton* (6), all shew that if machinery is attached to premises for the purpose of a business, it will increase the rateable value.

(1) Law Rep. 1 Q. B. 241.
(2) 31 J. P. 373.
(3) 32 L. T. 486.
(4) 14 Q. B. 587; 20 L. J. (M.C.) 155.
(5) 30 L. J. (M.C.) 68.
(6) 5 B. & S. 505; 33 L. J. (M.C.) 178.

[LUSH, J. A stove is removable, but it adds to the rateable value of a house. In *Reg.* v. *Halstead* (1), it was never intended to vary the rule laid down in *Reg.* v. *Lee.* (2)]

Edwards, Q.C., in reply.

Cur. adv. vult.

Jan. 25. The judgment of the Court (Cockburn, C.J., Mellor and Lush, JJ.), was delivered by

COCKBURN, C.J. This is an appeal against a rate for the relief of the poor, in which in assessing the appellant's premises, the value thereof has been treated as enhanced by reason of extensive machinery attached to them for the business carried on by the appellant, which is that of building, repairing, and fitting out iron and wooden ships. For this purpose, the appellant is in the occupation of extensive premises, into and upon which, the machinery in question, and which is of a ponderous character, is affixed.

The law on the subject of rating with reference to premises on which machinery has been erected with a view to the use of such premises for the purpose of manufacture, is settled by former decisions.

In *Rex* v. *Birmingham and Staffordshire Gas Light Co.* (3) where a rate had been made under a local Act, which required a valuation to be made periodically of all houses, &c., it was held, that where steam engines or other machines were affixed to the houses, the house was rateable according to its value as increased by the machinery. In *Reg.* v. *Guest* (4) it was held that in a rate upon buildings to which machinery is attached, the real property ought to be assessed according to its value as combined with the machinery, without regard to whether the machinery was real or personal property so as to be liable to distress or seizure under a fi. fa., or whether it would descend to the heir or executor, or would belong at the expiration of a lease, to the landlord or the tenant. This rule was again affirmed in *Reg.* v. *Southampton Dock Company* (5) in which it had been expressly found by the sessions, that the fixtures in question, although attached to the freehold

(1) 31 J. P. 373.
(2) Law Rep 1 Q. B. 241.
(3) 6 Ad. & E. 634.
(4) 7 Ad. & E. 951.
(5) 14 Q. B. 587; 20 L. J. (M.C.) 155.

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were capable of being detached from it, as easily and with as little injury to it as other fixtures put up for the purposes of the trade of the tenant and usually valued as between incoming and outgoing tenant.

In the case of *Reg.* v. *North Staffordshire Ry. Co.* (1), it was held that things which, though capable of being removed, are yet so far attached to the freehold that it is intended that they shall remain permanently connected with it, or with the premises used with it, and shall remain permanent appendages to it, as essential to the purpose for which the premises are used, must be taken into account in estimating the rateable value of the premises.

In *Reg.* v. *Lee* (2) the principle was applied to the retorts, purifiers, gasholders, steam-engines, boilers, and even pumps and exhausters, on premises fitted up and used as a gas manufactory, as being essential to the working of the manufacture, and, therefore, as having been erected with the view of their remaining permanently attached to the premises, even though some of the machinery, such as the pumps and exhausters, would have been removable as trade fixtures.

Applying the rule established by these decisions to the present case, it appears to us, after having carefully considered the character of the machinery in question, that the whole of it, though some of it may be capable of being removed without injury to itself or to the freehold, is essentially necessary to the shipbuilding business to which the appellant's premises are devoted, and must be taken to be intended to remain permanently attached to them so long as those premises are applied to their present purpose.

The case is consequently governed by the decisions which have been referred to, and our judgment must therefore be for the respondents.

Judgment for the respondents.

Solicitors for appellant: *Johnson & Weatherall, for E. H. Haswell, Sunderland.*

Solicitors for respondents: *Shum & Crossman, for Kidson, Son, & Mackenzie, Sunderland.*

(1) 30 L. J. (M.C.) 68. (2) Law Rep. 1 Q. B. 241.

[IN THE COURT OF APPEAL.]

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April 30.

RABBITS *v.* COX.

Land Tax—Hospital chartered before 1693—*Continuance of Exemption of Site after removal of Hospital*—4 *Wm. & M. c.* 1, *s.* 25—38 *Geo.* 3, *c.* 5, *ss.* 25, 29.

By 4 Wm. & M. c. 1, s. 25, the sites of hospitals were rendered exempt from chargeability to land tax. In 38 Geo. 3, c. 5, s. 25 (rendered perpetual by 38 Geo. 3, c. 60, s. 1) this exemption was repeated. By 38 Geo. 3, c. 5, s. 29, all such lands "belonging to any hospital . . . . as were assessed in the fourth year of the reign of King William and Queen Mary" were to be charged with the land tax: but no other lands "then belonging to any hospital" were to be assessed.

An hospital, erected and chartered before 4 Wm. & M. c. 1, was maintained until 1849, when, pursuant to a decree of the Court of Chancery, the almshouses of which it consisted were taken down and rebuilt upon another spot: the former site of the hospital was then let to the plaintiff:—

Held, reversing the judgment of the Queen's Bench Division, that the exemption from chargeability for land tax continued after the site had been let to the plaintiff.

affmd by H of L 3 App. Cas 473.

SPECIAL CASE in an action of trespass: the following are the material facts:—

In the commencement of the seventeenth century, the wardens and commonalty of the Mystery of Fishmongers of the city of London, being a corporation commonly called the Fishmongers' Company, purchased the freehold of a plot of ground at Newington Butts, in the parishes of Newington and St. George the Martyr, Surrey; and in October, 1618, letters patent were obtained whereby King James the First granted licence to the then wardens of the company to erect and establish in the parishes above-mentioned an hospital or almshouse, for the habitation and relief of so many poor men and women free of the company, as to the wardens and assistants of the company and their successors should seem fit; and the wardens and assistants of the company for the time being were incorporated for that purpose, with power to use a common seal, to hold land, and to make laws and statutes for the government of the hospital. Various gifts were made from time to time to the company in trust for the erection of alms-

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houses, and in the year 1636, twenty-two almshouses were completed upon the plot of ground above-mentioned, but they did not cover the whole of it. Subsequently, and after the year 1719, twenty additional almshouses, making a total number of forty-two, were built upon the rest of the plot of ground, and these were maintained by the company till the removal of the hospital to Wandsworth.

In the year 1848, the company purchased the fee simple of a plot of ground at Wandsworth, the land tax of which was redeemed. On the 27th of July, 1849, the Vice-Chancellor of England, by an order made in a suit instituted in the Court of Chancery, on the information of the Attorney General on the relation of J. M. Wrench, against the company, ordered that the company should be at liberty, at their own expense, to take down the forty-two almshouses and to erect an equal number of new almshouses in lieu thereof upon the piece of ground belonging to the company at Wandsworth, upon the terms of the company being allowed to appropriate to their own use the materials of the almshouses so to be taken down, and to appropriate and hold the site thereof discharged from the charitable trusts to which they were then subject.

The company accordingly took down the forty-two almshouses, and erected an equal number of new almshouses in their stead upon the ground at Wandsworth, which were afterwards occupied and used for the purposes of the charities. When the land at Newington had been cleared under the authority of the Vice-Chancellor's order, the plaintiff having entered into an agreement with the company for a building lease, erected a messuage on a portion thereof, and on the 8th of March, 1860, the company demised such portion to the plaintiff, with the messuage erected thereon by him, for the term of seventy-two years from the 29th of September, 1858, at a peppercorn rent for the first year and at a yearly rent of 125*l.* for the residue of the term. The land included in the lease to the plaintiff, was a portion of the land purchased by the company in the beginning of the seventeenth century, and it also formed a portion of the site of the almshouses completed in 1636. Neither the land nor the buildings erected thereon were assessed to the land tax until the almshouses were

pulled down after the making of the Vice-Chancellor's order. The plaintiff was first charged and assessed to the land tax in respect of the messuage in his possession in the year 1860. He always refused to pay the land tax, which was made yearly after that year. In 1871, the defendant, acting as the agent and collector of the commissioners of land tax, seized on their behalf the plaintiff's goods, for the purpose of enforcing payment of the arrears of land tax alleged to be due up to that time.

The question for the opinion of the Court was, whether the land in possession of the plaintiff was liable to be charged and assessed by the Land Tax Commissioners to the land tax.

1876. Nov. 17. *Sir H. Giffard, S.G.* (*Poland* with him), for the plaintiff.

Edward Clarke (*Lyon* with him), for the defendant.

The arguments are sufficiently noticed in the judgment of the Court: *Lord Colchester* v. *Kewney* (1), was cited.

Cur. adv. vult.

1877. Jan. 16. The judgment of the Court (Cockburn, C.J., and Lush, J.), was delivered by

LUSH, J. The question in this case is, whether the site of an ancient hospital which was in existence before the passing of the Land Tax Act, 38 Geo. 3, c. 5, and was therefore exempted from assessment to the land tax by the express provisions of that Act, still retains the exemption, although the hospital has been removed to another site, and the land has by a decree of the Court of Chancery been discharged from the charitable trusts.

The history of the institution is stated in the case. It will be sufficient here to observe, that the hospital was erected and chartered before the passing of 4 Wm. & M. c. 1, that it was considerably enlarged in subsequent years, and that it was maintained until the year 1849, when a decree was made enabling the governors to take down the forty-two almshouses, of which the charity then consisted, and to erect an equal number of houses upon another piece of ground, which had been obtained for the purpose. This

(1) Law Rep. 2 Ex. 253.

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was done, and the land, the site of the old foundation, was let to the plaintiff on a building lease.

We took time after the argument to look into the Land Tax Acts, and we have come to the conclusion that the defendant's construction is the right one, and that the land has become and is chargeable to the land tax.

The 38 Geo. 3, c. 5, made perpetual as regards the land tax by c. 60 of the same year, is in substance a re-enactment of 4 Wm. & M. c. 1. But it is necessary to go back to the older statute in order to make the sections of the later Act intelligible.

The 25th sect. of the Act of William & Mary, provides that nothing therein contained "shall extend to charge any college or hall in either of the two universities, or the colleges of Windsor, Eton, Winton, or Westminster, or the corporation of the governors of the charity for relief of poor widows and children of clergymen, or the college of Bromley, or any hospital, for or in respect of the sites of the said colleges, halls, or hospitals, . . . or to charge any of the houses or lands belonging to Christ's Hospital, St. Bartholomew's, Bridewell, St. Thomas's, and Bethlehem Hospital, . . . or the said corporation of the governors of the charity for the relief of poor widows and children of clergymen, or the college of Bromley; nor to extend to charge any other hospitals or almshouses, for or in respect only of any rents or revenues payable to the said hospitals or almshouses, being to be received and disbursed for the immediate use and relief of the poor in the said hospitals or almshouses only." The subjects of this exemption are, first, the hospitals themselves; secondly, the houses or lands belonging to certain specified hospitals; and, thirdly, the rents and revenues payable to any other hospital for the immediate use of the poor in them.

By the next clause, s. 26, the tenants of the hospital lands are declared not exempt from chargeability for so much as their lands are worth over and above the rents they pay.

The 25th section of the present Act, in like manner, exempts these three classes of property, but with limitation as to the second and third class. It provides that nothing in the Act shall extend to charge "any hospital . . . for or in respect of the site of the said . . . hospital, or any of the buildings within the walls

or limits of the" same, . . . "or to charge any of the houses or lands which on or before the 25th March, 1693" (the period when the 4 Wm. & M. was in force), "did belong . . . to Christ's Hospital, St. Bartholomew's, Bridewell, St. Thomas's, and Bethlehem Hospitals, . . . or to the said corporation of the governors of the charity for the relief of the poor widows and children of clergymen, or the college of Bromley, or shall extend to charge any other hospitals or almshouses . . . for or in respect only of any rents or revenues, which on or before the said 25th March, 1693, were payable to the said hospitals or almshouses, being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and almshouses only."

It will be observed that this Act, while it preserves the immunity of hospitals themselves without regard to the date of their institution to the same extent as did the Act of William & Mary, limits the exception, as regards their sources of income, to such lands, rents, and revenues as belonged to them on the 25th of March, 1693. The consequence is, that hospitals erected since that period enjoy exemption from land tax as regards their sites, but not as regards any lands or rent which may belong to them as sources of income apart from the site of the hospitals themselves. And as regards ancient hospitals, namely, such as were in existence in 1693, if they have acquired any additional lands not occupied as the site of the hospital itself, those lands are chargeable with the land tax. Hence the 42 Geo. 3, c. 116, contains provisions which expressly enable governors of hospitals to redeem the land tax chargeable on the hospital lands. The 26th section of the Act in question, like the 26th section of the Act of William & Mary, makes the tenants chargeable for any excess of value over the rents they pay. The 27th section enacts that tenants, who by the terms of their leases are bound to pay all taxes, shall be charged at the full value of their holdings. The 28th provides for settling disputes as to the lands which ought to be assessed, &c. Then comes the 29th, upon which a good deal of the argument was founded. It is in these terms: "Provided always, and it is hereby enacted, that all such lands, revenues, or rents belonging to any hospital or almshouse, or settled to any charitable or pious use, as were assessed in the fourth year of the reign of

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King William and Queen Mary, shall be, and are hereby adjudged to be liable to be charged towards the payment of this present aid; and that no other lands, tenements, or hereditaments, revenues, or rents whatsoever then belonging to any hospital or almshouse, or settled to any charitable or pious uses as aforesaid, shall be charged, taxed, or assessed by virtue of this Act towards the said sum to be raised, &c., anything herein contained to the contrary notwithstanding." This section, which, it must be admitted, is not happily framed, seems to us to be merely a corollary to the 25th section, and to be intended to emphasize the words of limitation we have just observed upon. For, whereas that section says that lands and rents which were in 1693 exempted as belonging to a hospital shall be still exempt, the 29th section adds what was necessarily implied, that all lands which were then assessed shall remain chargeable; and that lands which were not then assessed shall not be now assessed. It seems unnecessary to observe that both sections deal with hospital lands—lands belonging to or forming the site of an existing hospital. The land in question was the site of a hospital, and as such it was exempted by the express language of the 25th section until the erection of the new hospital on another site, when it became, by virtue of the decree mentioned in the case, discharged from the charitable trust. So long as it was the site of a hospital, it was the subject of a special exemption conferred upon it in consideration of its eleemosynary character, but when it ceased to be so, it ceased to be under the 25th section, and fell under the general taxing clause. The Act, as we have seen, does not exonerate all hospital lands; why should it be supposed that the legislature intended that lands, once exempted from charge because they belonged to a hospital, should be for ever exempted, though they cease to be hospital lands? There is not a word in the Act which shews an intention to perpetuate the immunity, or to continue it longer than the land should be used for the special purpose in consideration of which the privilege was granted; nor can any reason be suggested why it should be.

Our judgment is, therefore, for the defendant.

Judgment for the defendant.

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The plaintiff appealed.

April 30. *Sir H. Giffard, S.G.*, and *Lumley Smith*, for the plaintiff. The plaintiff's land is exempt from land tax by force of 38 Geo. 3, c. 5, s. 29: the important word is "then," and by the judgment of the Queen's Bench Division no force is given to it. The question now raised was noticed in *Lord Colchester* v. *Kewney* (1), but it did not there call for decision; it seems to follow from that case that a new site will not be exempt from the tax, at least by force of the statutory provisions as to exemption, and if the plaintiff's land becomes liable the hospital will be deprived of the benefit which the latter clause of s. 29 was intended to confer.

Edward Clarke, and *Lyon*, for the defendant. Sect. 29 is a mere corollary upon s. 25. The legislature did not intend that the land, but that the hospital should enjoy the immunity from the tax. An exemption from the operation of the general law must be construed strictly: *Novello* v. *Toogood* (2).

JAMES, L.J. We must reverse the judgment of the Queen's Bench Division. I cannot get over the plain words of s. 29. Even upon the first clause of that enactment a good deal might be said in favour of the plaintiff's contention; but the latter clause puts the matter beyond all doubt, and it is plain that the lands of this hospital are not to be charged if they are other than "such lands as were assessed in the fourth year of the reign of their late majesties King William and Queen Mary." The land in respect of which the defendant seized the plaintiff's goods was not assessed in that year, and therefore it is exempt. It is said that s. 29 is a mere corollary of s. 25; I cannot follow that argument; s. 29 in effect treats of a new subject. I see no reason why we should depart from the plain words of the statute. The exemption was intended to operate for the benefit of charitable institutions; and it is in accordance with the intention of the legislature that the site should in the hands of a purchaser be exempt from the tax. Another reason is that it seems to follow, from *Lord Colchester* v. *Kewney* (3), that the new site

(1) Law Rep. 2 Ex. 253, at pp. 257, 258.
(2) 1 B. & C. 554.
(3) Law Rep. 2 Ex. 253.

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would not be exempt if the land tax thereon had not been redeemed. I am of opinion that the question put in the special case must be answered in favour of the plaintiff.

BAGGALLAY, L.J. I was much impressed by the argument for the defendant; but on further reflection I cannot think that s. 29 is merely a corollary upon s. 25. The phraseology is quite different, and s. 29 was intended to have a distinct operation.

BRAMWELL, L.J., concurred.

BRETT, L.J. The argument for the defendant has not convinced me. I cannot see how the plaintiff's land can be taken out of the exemption created by s. 29. The words are perfectly clear, and we ought not to construe a plain enactment so as to make it suit our views of what is right and just. Upon referring to the words of s. 29 we find that the lands belonging to an hospital, and assessed in the fourth year of the reign of William and Mary, are to be charged; but that no other lands "then belonging to any hospital" shall be taxed. The argument for the defendant strikes out of the section the word "then;" but this would be opposed to the general rule of construction, that so far as is possible effect must be given to every word. The only reasonable interpretation of the word "then" is to refer it to the fourth year of William and Mary.

Judgment reversed. (1)

Solicitor for plaintiff: *C. O. Humphreys.*
Solicitors for defendant: *Simpson & Palmer.*

(1) This judgment of the Court of Appeal was affirmed in the House of Lords upon substantially the same grounds, on the 26th of March, 1878.

[IN THE COURT OF APPEAL.]

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Feb. 20.

THE SOUTHWARK AND VAUXHALL WATER COMPANY *v.* QUICK.

Practice—Discovery and Inspection of Documents—Communication from Agent of Party—Instructions to Solicitor and Materials for such Instructions—Privilege.

Documents prepared in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged if prepared with a bonâ fide intention of being laid before him for the purpose of taking his advice; and an inspection of such documents cannot be enforced.

APPLICATION on behalf of the defendant for the inspection of certain documents that had been scheduled by the plaintiffs in their affidavit of discovery. The application was referred by Field, J., from chambers to the Court. The action was by the company against their former engineer to recover various sums of money which, it was alleged by the company, had been wrongly debited to them in accounts that had been settled between them and the defendant.

The documents in question were stated in the plaintiffs' affidavits to be as follows:

1. A transcript of short-hand writer's notes of a conversation between a chimneysweep employed by the company and the company's engineer, for the purpose of such engineer's obtaining information and reporting the same to the board of directors to be furnished to the company's solicitor for his advice in relation to the intended action.

2. Transcripts of shorthand writer's notes, of interviews between the chairman of the company and the engineer, and certain inspectors of the company, obtained with a view of submitting the same to the company's solicitor for advice in relation to the intended action. The transcripts of the notes were afterwards handed to such solicitor.

3. A statement of facts drawn up by the chairman of the company to be submitted to the company's solicitor for advice in relation to the intended action. It appeared that the statement of facts was afterwards submitted to the solicitor.

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Feb. 4. *J. C. Mathew*, for the defendant, moved for a rule for inspection of the documents in question. The case of *Anderson* v. *Bank of British Columbia* (1) is an authority directly in the defendant's favour. It is clear since that decision that it is not sufficient in order to make a document privileged that it should have come into existence in contemplation of litigation. It was there held by the Court of Appeal, that a written communication by an agent to his principal made in contemplation of litigation was not privileged. *Bustros* v. *White* (2) is another decision of the Court of Appeal to the same effect. The effect of those decisions is to confine the privilege to communications between the party to the litigation and his solicitor. If on the advice of the solicitor when consulted with reference to the litigation, or at his instance, or at his request, written communications are procured from an agent of the party to be submitted to such solicitor, those communications would fall within the same rule as written communications by the party to his solicitor. But there can be no privilege until the relation as solicitor and client is established, and the solicitor is consulted, and then only with regard to documents that are in the nature of communications between the party and his solicitor. Communications spontaneously procured by the party from his agent to be submitted to his solicitor, are not privileged, and the other side is as much entitled to discovery of them as of any other document relating to the subject-matter of the action in the principal's possession. Knowledge that the principal procures from his agent with regard to the subject-matter of the action, before the relation of solicitor and client has commenced, is not within the principle upon which the privilege is based. Even if the documents that were actually submitted to the plaintiff's solicitor were privileged, document No. 1, which is not stated to have been actually submitted to the solicitor, is not privileged. In *Friend* v. *London, Chatham, and Dover Ry. Co.* (3), the affidavit stated that the communications were written at the instance and for the use of the solicitors of the defendants, for the purpose of the legal proceedings.

Arthur Wilson, for the plaintiffs, shewed cause. The present

(1) 2 Ch. D. 644. (2) 1 Q. B. D. 423.
(3) 2 Ex. D. 437.

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case is not within the authority of the decisions that have been cited. It is admitted that the only privilege is with reference to the relation between solicitor and client. In those cases the documents in question had nothing to do with such relation. It is not disputed that communications procured by the advice of the solicitor are privileged. This is pointed out in the judgment of Jessel, M.R., in *Bustros* v. *White*. (1)

The documents in the present case are intermediate between those held not to be privileged in *Anderson* v. *Bank of British Columbia* (2) and those which it was laid down would be privileged in *Bustros* v. *White* (1). These documents, though not procured on the advice of the solicitor, and indeed procured before he was consulted, were nevertheless procured as instructions to the solicitor, or as materials for such instructions. It is submitted that document No. 3, which constituted the instructions to the solicitor for the action then determined on, was clearly privileged, and it is contended that documents Nos. 1 and 2, which were the materials for such instructions, fell within the same privilege. There being no decision exactly in point, it is necessary to look to the reason of the privilege. The reason of it is that it is essential to the interests of justice that there should be complete freedom of communication between the client and the solicitor. This freedom cannot be protected unless the privilege goes as far as is now contended for on behalf of the plaintiffs.

J. C. Mathew, in reply. The defendant's contention would really destroy the effect of the decisions in the Court of Appeal. Such communications are always submitted to the solicitor, and it would be always said that they were procured as materials for instructions to him.

COCKBURN, C.J. I am of opinion that this application should be refused. We are bound by the decisions of the Court of Appeal which have been cited, but the principle of those decisions does not appear to me to include the present case. The relation between the client and his professional legal adviser is a confidential relation of such a nature that to my mind the maintenance of the privilege with regard to it is essential to the interests of

(1) 1 Q. B. D. 423. (2) 2 Ch. D. 644.

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justice and the well-being of society. Though it might occasionally happen that the removal of the privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the attendant risk. The question here is whether the documents of which inspection is sought are within the privilege. I think they are. It is clear that they were documents containing information which had been obtained by the plaintiffs with a view to consulting their professional adviser. Two out of the three sorts of documents were actually submitted to him; as to the other it is not clear whether it was actually submitted to him or not. It is admitted upon the decisions that where information has been obtained on the advice of the party's solicitor it is privileged. I can see no distinction between information obtained upon the suggestion of a solicitor, with the view of its being submitted to him for the purpose of his advising upon it, and that procured spontaneously by the client for the same purpose. Again, I see no distinction between the information so voluntarily procured for that purpose and actually submitted to the solicitor, and that so procured but not yet submitted to him. If the Court or the judge at chambers is satisfied that it was bonâ fide procured for the purpose, it appears to me that it ought to be privileged. Though fully recognising the authority of the decisions of the Court of Appeal which have been referred to, I do not feel bound nor am I disposed to carry the doctrine of those decisions to the extent suggested on behalf of the defendant.

MELLOR, J. I agree with the opinion expressed by my Lord. I am satisfied that the decisions of the Court of Appeal, by which I am entirely prepared to abide, do not govern this case. It is conceded that information procured by the advice of a solicitor to be submitted to him is privileged. If so, I cannot understand the distinction between such information and that spontaneously procured for the same purpose. I cannot think that the Court of Appeal meant to decide that such information must be disclosed. I do not see any sound distinction between the document that was not actually submitted to the solicitor and those that were, provided the former was really intended to be submitted to him.

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MANISTY, J. As to the documents that were actually submitted to the solicitor I entirely agree. As to the other document I have some doubt; but the distinction is perhaps rather subtle, and I am not prepared to differ from my Lord and my Brother Mellor. With regard to the statement of facts by the chairman, it would be monstrous that such a statement, made for the purpose of being laid before the company's solicitor, and actually laid before him, should not be privileged. What can be the difference between asking to see such a statement and asking what oral instructions were given to a solicitor? The same principle also applies, I think, to the other set of documents that were submitted to the plaintiffs' solicitor.

Order refused.

Feb. 20. The defendant appealed.

J. C. Mathew, for the defendant.

Arthur Wilson, for the plaintiffs.

The arguments and the cases cited were the same as in the Court below.

BRAMWELL, L.J. I am of opinion that this case is governed by the principle laid down in *Anderson* v. *Bank of British Columbia* (1), and that the appeal should be dismissed.

BRETT, L.J. I am of the same opinion. It seems to me that the case of *Bustros* v. *White* (2) is not in point; the documents which the plaintiff declined in that case to produce were letters forming part of a correspondence between the plaintiff and other persons, and not between the plaintiff and his solicitor; neither is the present case governed by *Friend* v. *London, Chatham, and Dover Ry. Co.* (3), for in that case the communications were written "at the instance, and for the use of the solicitor." The question, therefore, depends upon what is the principle to be extracted from *Anderson* v. *Bank of British Columbia.* (1) The facts of that case do not apply to the present, but the judgment lays down a rule upon which we ought to act. James, L.J., lays down a rule, which I think is in effect what was said by Jessel, M.R.,

(1) 2 Ch. D. 644. (2) 1 Q. B. D. 423.
(3) 2 Ex. D. 437.

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in the Court below, and also mentioned by Mellish, L.J., in his judgment; he says, "Looking at the dicta, and the judgments cited, they might require to be fully considered; but I think they may possibly all be based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief." Now reading that passage with what was said by Mellish, L.J., in the course of the argument, it is clear that if a party seeks to inspect a document which comes into existence merely as the materials for the brief, or that which is equivalent to the brief, then the document cannot be seen, for it is privileged. It has been urged that the materials, or the information obtained for the brief, should have been obtained "at the instance" or "at the request" of the solicitor; but I think it is enough if they come into existence merely as the materials for the brief, and I think that phrase may be enlarged into "merely for the purpose of being laid before the solicitor for his advice or for his consideration." If this is the correct rule, the only question is whether the affidavits in the present case bring the documents under discussion within that rule. I think all the classes of documents mentioned are brought within the rule. The only document about which there can be any doubt is the transcript of the shorthand writer's note of the conversation between the chimney-sweep and the company's engineer; but I think that the Queen's Bench Division construed the language of the affidavit to mean that the transcript was made in order that it might be furnished to the solicitor for his advice, although before passing on to him, it was to be laid before the board of directors, or reported to the board, in order than they also might see it. The object for which the notes were taken, and the transcript made, was that they might be furnished to the solicitor for his advice. If that is so, then it stands on the same footing as the others, except that it was not sent to the solicitor; that cannot make any difference. If at the time the document is brought into existence its purpose is that it should be laid before the solicitor, if that purpose is true and clearly appears upon the affidavit, it is not taken out of the privilege merely because afterwards it was not laid before the solicitor. It might not have been laid before the solicitor,

because the person making the statement had died or went away and could not be found. I think, therefore, that this document having been made bonâ fide merely for the purpose of being laid before the solicitor for his advice or his consideration, it is precisely like the other documents, and that all the documents are privileged.

COTTON, L.J. I am of opinion that the judgment of the Queen's Bench Division was right. We are discussing the question of discovery, but discovery in a particular way, and I call attention to that, because in the argument I think sufficient distinction was not taken between the particular modes of discovery: discovery by the production of documents, and discovery by compelling an opponent to answer interrogatories. As regards the latter, the directors of a company, in answering interrogatories, must not only answer as to their own individual knowledge, but in answering for the company they must get such information as they can from other servants of the company who personally have conducted the transaction in question, and they cannot properly answer interrogatories by saying they know nothing about the matter, when it is in their power to obtain information from other servants of the company who may have personal knowledge of the facts; and it is perfectly clear if the information has been communicated to them from the other servants of the company, in answering interrogatories properly administered to them, they must disclose to their opponent the knowledge which they got from that communication, even though the communication itself may be a document which is privileged.

5 C P D 107

We are now dealing with the production of documents, and the question is, whether the documents do or do not come within what is called privilege? Privilege only extends to communications with legal advisers, or in some way connected with legal advisers; communications with a most confidential agent are not protected if that confidential agent happens not to be a solicitor. And this proceeds on the principle that laymen (by which I mean persons not learned in the law) cannot be expected to conduct their defence or litigation without the assistance of professional advisers; and, for the purpose of having the litiga-

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tion conducted properly, the law has said that communications between the client and the solicitor shall be privileged, and that no one shall be entitled to call for the production of a document which has been submitted to the solicitor for the purpose of obtaining his advice, or for the purpose of enabling him to institute or to defend proceedings. There must be the freest possible communication between solicitor and client, and it is on this ground that professional communications are entitled to privilege, which excepts them from the general rule. The most obvious form of claiming privilege is when any litigant sends either directly or indirectly to his solicitor a document for the purpose of obtaining his advice, or for the purpose of enabling him to institute or defend an action. That is not quite the question here, but there is another class of cases, where information or evidence, which is usually obtained by the solicitor himself, is not obtained by him, but a document stating what evidence can be given, is prepared to be communicated to the solicitor. It was conceded on behalf of the defendant, that if the documents had been obtained or prepared at the instance and by the instruction of the solicitor, they would be privileged, though not prepared by the solicitor himself, and the contention is, in fact, that there was no request beforehand by the solicitor that this information should be obtained. I am of opinion that would be an unsubstantial distinction. I believe there is no case directly in point, in which it has been held that the want of a request by the solicitor is fatal to the privilege claimed, but in *Friend* v. *London, Chatham, and Dover Ry. Co.* (1) Cockburn, C.J., pointed out the correct principle. He said: "I think that the defendants' affidavit, which is unanswered, and therefore must be assumed to be true, brings this case within the exception to the general rule mentioned in *Bustros* v. *White.* (2) The defendants intended that the medical men should make the examination merely with the view of informing their solicitor." That, I think, is the true principle, that if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice, or of enabling him either to prosecute or defend an action, then it is privileged, because it is something done for the purpose

(1) 2 Ex. D. 437. (2) 1 Q. B. D. 423.

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of serving as a communication between the client and the solicitor. I agree with Brett, L.J., that except the transcript of the short-hand writer's note of the conversation between the chimneysweep and the company's engineer, these are documents which clearly were prepared for the purpose of being laid before the solicitor of the company for obtaining his advice, and, as regards that document, though that is not stated quite so clearly, I think that in substance the transcript is also stated to have been prepared for the purpose of being laid before the solicitor. The fact that it was not laid before him can in my opinion make no difference; the object of the rule and the principle of the rule is that a person should not be in any way fettered in communicating with his solicitor, and that must necessarily involve that he is not to be fettered in preparing documents to be communicated to his solicitor. If such a distinction prevails, what is to be the rule where the application for production is made before a document is laid before the solicitor, but which it is intended should be laid before him? Is it then to be produced? If so, is it to be saved from production, because after the original application, but before the appeal is heard, the party has in fact laid the document before his solicitor? The distinction, in my opinion, is not one which can be supported. All these documents must be looked upon as having been prepared for the purpose of being laid before the solicitor, either for the purpose of enabling him to prosecute the action contemplated, or for the purpose of obtaining his advice on the question at issue in the action, and in my opinion are privileged. The appeal should therefore be dismissed.

Appeal dismissed.

Solicitor for plaintiffs: *Bircham.*
Solicitors for defendant: *Hollams, Sons, & Coward.*

1878
March 5.

[IN THE COURT OF APPEAL.]

WINTERFIELD *v.* BRADNUM.

Security for Costs—Foreigner, residing without the Jurisdiction—Counter-claim.

A defendant who admits the cause of action sued upon and sets up a counter-claim founded upon a distinct claim, is not entitled to security for costs from the plaintiff, a foreigner residing without the jurisdiction.

CLAIM for goods sold and delivered.

The defendant admitted his liability for the debt, and set up, by way of counter-claim, a claim for damages for breach of a contract for not delivering onions.

The plaintiff was a foreigner residing abroad.

The defendant's counter-claim exceeded in amount the plaintiff's claim.

The Queen's Bench Division refused an application that the plaintiff be ordered to give security for costs.

The defendant appealed.

Feb. 27. *Anstie* for the defendant. The Queen's Bench Division decided that although a plaintiff residing out of the jurisdiction of the Court must give security for costs, yet the principle ought not to be extended to a case where a defendant sets up a counter-claim, which is a new right conferred recently by statute. If the defendant had asked for security before he had pleaded, he would certainly have been entitled to it; if he had pleaded a set-off greater than the plaintiff's claim, he likewise would have been entitled to security, and under the present system he would have judgment in his favour for the balance. Why, then, is he not entitled to security when he admits the plaintiff's claim and sets up a counter-claim? On principle there is no reason why he should be deprived of his security. It is true that the counter-claim is in the nature of a new action, but in effect it does not differ from the case where the defendant's set-off exceeds the plaintiff's demand, and judgment is given for the defendant for the excess. In that case there is one proceeding and one judgment: *Staples* v.

Young (1); and the present case is strictly analogous: there is only one proceeding and one judgment. Here the defendant has admitted the plaintiff's claim and set up a counter-claim, but if the defendant had denied the plaintiff's claim and had also pleaded a counter-claim he would have been entitled to security. If a plaintiff resides without the jurisdiction and brings the defendant into court, the defendant is entitled, as a general rule, to security for his costs.

Raikes, for the plaintiff. The judgment of the Queen's Bench Division ought to be maintained. The right to plead a counter-claim is a new right recently conferred by statute: it is in the nature of a fresh action, and a defendant who merely sets up a counter-claim in answer to a plaintiff's claim ought not to be allowed to call upon a plaintiff residing out of the jurisdiction to give security for costs. If the defendant had brought an action instead of pleading a counter-claim, he would not have been entitled to have security; he is in the same position as if he had taken that course. In *The Julia Fisher* (2) a defendant residing out of the jurisdiction was ordered to give security for costs, the Court treating the counter-claim as if it were a separate action.

Cur. adv. vult.

March 5. BRAMWELL, L.J. Upon the whole I think that the appeal should be dismissed. I do not say that in no case security is to be given where the defendant sets up a counter-claim and the plaintiff is a foreigner residing abroad. I agree with the reasoning of the defendant's counsel that a counter-claim is an extended set-off, and that if it is more extensive than the claim it enables the defendant to recover the balance. Suppose an action in which the plaintiff sues for the price of ten parcels of goods, one of which has been delivered, and the defendant says that he admits he is liable for the price of one, but alleges that all the ten parcels are inferior to contract and that he has a counter-claim for damages; why should not the defendant in such a case as this have security for costs? Again, suppose a counter-claim for exactly the same amount, I see no reason why he should not have security for costs. Moreover, in some cases the defendant may be entitled to security

(1) 2 Ex. D. 324. (2) 2 P. D. 115.

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on the ground of the plaintiff being a foreigner residing abroad, although the defendant's real defence consists in his counter-claim; but in this case the Queen's Bench Division have refused the defendant's application, and I think it wrong to encourage appeals of this sort. I think that the judgment ought to be affirmed.

BRETT, L.J. The question before us is whether the defendant is entitled to security in respect of his counter-claim, for he admits the plaintiff's claim. A counter-claim is sometimes a mere set-off; sometimes it is in the nature of a cross action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counter-claim is, that they are wholly independent suits which, for convenience of procedure, are combined in one action. I know that a practice has arisen that if the counter-claim overtops the plaintiff's claim, judgment is entered for the defendant, and costs given accordingly. But I think that the allocatur should only be for the difference of the costs between the respective parties. I think that security for costs should not be given where the defendant sets up such a counter-claim as this.

COTTON, L.J. I am of the same opinion. The counter-claim is in the nature of a new action, and in respect of that the defendant cannot have security for costs.

Appeal dismissed.

Solicitor for plaintiff: *John Scott.*
Solicitors for defendants: *Waterhouse & Winterbottom.*

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April 15.

Negligence—Dangerous Instrument in Road—Proximate Cause of Injury—Intervening Act of third Party—Remoteness of Damage.

The defendant, who was in the occupation of certain premises abutting on a private road consisting of a carriage and footway, which premises he used for the purposes of athletic sports, had erected a barrier across the road to prevent persons driving vehicles up to the fence surrounding his premises and overlooking the sports. In the middle of this barrier was a gap which was usually open for the passage of vehicles, but which, when the sports were going on, was closed by means of a pole let down across it. It was admitted that the defendant had no legal right to erect this barrier. Some person, without the defendant's authority, removed a part of the barrier armed with spikes, commonly called chevaux de frise, from the carriageway where the defendant had placed it, and put it in an upright position across the footpath. The plaintiff, on a dark night, was lawfully passing along the road on his way from one of the houses to which it led. He felt his way through the opening in the middle of the barrier, and getting on to the footpath was proceeding along it when his eye came in contact with one of the spikes of the chevaux de frise and was injured. It was not suggested that the plaintiff was guilty of any negligence contributing to the accident, and the jury found that the use of the chevaux de frise in the road was dangerous to the safety of the persons using it:—

Held, that the defendant, having unlawfully placed a dangerous instrument in the road, was liable in respect of injuries occasioned by it to the plaintiff, who was lawfully using the road, notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party in removing the dangerous instrument from the carriageway, where the defendant had placed it, to the footpath.

Mangan v. *Atterton* (Law Rep. 1 Ex. 239) discussed.

THIS was a case tried before Cockburn, C.J., at the Hilary Sittings in Middlesex. The Lord Chief Justice did not give judgment at the trial for the damages found by the jury for the plaintiff, but reserved the case for further consideration, and it was accordingly argued before the Lord Chief Justice and Manisty, J.

The facts, the nature of the action, and the arguments, sufficiently appear from the judgment.

Feb. 18. *Willis, Q.C.*, and *Glyn*, for the plaintiff.

Hannen, for the defendant.

The following authorities were cited: *Ionides* v. *Universal*

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Marine Insurance Company (1); *Corby* v. *Hill* (2); *Lynch* v. *Nurdin* (3); *Dixon* v. *Bell* (4); *Burrows* v. *March Gas Company* (5); *Collins* v. *Middle Level Commissioners* (6); *Mangan* v. *Atterton* (7); *Abbott* v. *Macfie* (8); *Hoey* v. *Felton* (9); *Blagrave* v. *Bristol Waterworks Company* (10); *Barber* v. *Lesiter* (11); *Sharp* v. *Powell* (12).

Cur. adv. vult.

April 15. The judgment of Cockburn, C.J., and Manisty, J., was delivered by

COCKBURN, C.J. This is a case of considerable nicety, and which, so far as the precise facts are concerned, presents itself for the first time.

The defendant is in the occupation of premises which abut on a private road leading to certain other premises as well as to his; it consists of a carriage road and a footway. The soil of both is the property of a different owner; the defendant has no interest in it beyond the right of way to and from his premises.

The defendant uses his premises as a place where athletic sports are carried on by persons resorting thereto for that purpose for their own amusement. His customers finding themselves annoyed by persons coming along the road in question in carts and vehicles and stationing themselves opposite to his grounds and overlooking the sports, the height of the carts and vehicles enabling them to see over the fence, the defendant erected a barrier across the road for the purpose of preventing vehicles from getting as far as his grounds.

This barrier consisted of a hurdle set up lengthways next to the footpath, then two wooden barriers armed with spikes, commonly called chevaux de frise, then there was left an open space through

(1) 14 C. B. (N.S.) 259; 32 L. J. (C.P.) 170.
(2) 4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318.
(3) 1 Q. B. 29; 10 L. J. (Q.B.) 73.
(4) 5 M. & S. 198.
(5) Law Rep. 5 Ex. 67; Ibid. 7 Ex. 96.
(6) Law Rep. 4 C. P. 279.
(7) 4 H. & C. 388; Law Rep. 1 Ex. 239.
(8) 2 H. & C. 744; 33 L. J. (Ex.) 177.
(9) 11 C. B. (N.S.) 142; 31 L. J. (C.P.) 105.
(10) 1 H. & N. 369; 26 L. J. (Ex.) 57.
(11) 7 C. B. (N.S.) 175.
(12) Law Rep. 7 C. P. 253.

which a vehicle could pass; then came another large hurdle set up lengthways, which blocked up the rest of the road. At ordinary times the space between the two divisions of the barrier was left open for vehicles to pass which might be going to any of the other premises to which the road in question led. But at the times when the sports were going on, a pole attached by suitable apparatus was carried across from the one part of the barrier to the other, and so the road was effectually blocked.

Amongst the houses and grounds to which this private road led was that of a Mr. Bruen. On the evening on which the accident which gave rise to the present action occurred the plaintiff, who occupied premises in the immediate neighbourhood, accompanied Mr. Bruen, by the invitation of the latter, to Bruen's house. It was extremely dark, but being aware of the barrier and the opening in it, they found the opening, the pole not being set across it, and passed through it in safety; but on his return, later in the evening, the plaintiff was not equally fortunate. It appears that, in the course of that day or the day previous, some one had removed one of the chevaux de frise hurdles from the place where it had stood, and had placed it in an upright position across the footpath. Coming back along the middle of the road, the plaintiff, feeling his way, passed safely through the opening in the centre of the barrier; having done which, being wholly unaware, it being much too dark to see, that there was any obstruction on the footpath, he turned on to the latter, intending to walk along it the rest of the way. He had advanced only two or three steps when his eye came into collision with one of the spikes, the effect of which was that the eye was forced out of its socket. It did not appear by whom the chevaux de frise hurdle had been thus removed, but it was expressly found by the jury that this was not done by the defendant or by his authority. The question is, whether the defendant can be held liable for the injury thus occasioned. It is admitted that what the defendant did in erecting this barrier across the road was unauthorized and wrongful, and it is not disputed that the plaintiff was lawfully using the road. There is no ground for imputing to him any negligence contributing to the accident. The jury have expressly found, in answer to a question put to them by me, that the use of the

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chevaux de frise in the road was dangerous to the safety of persons using it. The ground of defence in point of law taken at the trial and on the argument on the rule was, that, although if the injury had resulted from the use of the chevaux de frise hurdle as placed by the defendant on the road, the defendant, on the facts as admitted or as found by the jury, might have been liable; yet, as the immediate cause of the accident was not the act of the defendant, but that of the person, whoever he may have been, who removed the spiked hurdle from where the defendant had fixed it and placed it across the footway, the defendant could not be held liable for an injury resulting from the act of another. On the part of the plaintiff it was contended that as the act of the defendant in placing a dangerous instrument on the road had been the primary cause of the evil, by affording the occasion for its being removed and placed on the footpath, and so causing the injury to the plaintiff, he was responsible in law for the consequences. Numerous authorities were cited in support of this position. The first is the case of *Scott* v. *Shepherd*. (1) In that case the defendant threw a lighted squib into a market house where several persons were assembled. It fell upon a standing, the owner of which, in self defence, took it up and threw it across the market house. It fell upon another standing, the owner of which, in self defence, took it up and threw it to another part of the market house, and in its course it struck the plaintiff, and exploded and put out his eye. The defendant was held liable, although without the intervention of a third person the squib would not have injured the plaintiff.

In *Dixon* v. *Bell* (2) the defendant, having left a loaded gun with another man, sent a young girl to fetch it, with a message to the man in whose custody it was to remove the priming, which the latter, as he thought, did, but, as it turned out, did not do effectually. The girl brought it home, and, thinking that the priming having been removed the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off and injured the child. The defendant was held liable, "as by this want of care," says Lord Ellenborough—that is, by leaving the gun without drawing the charge or seeing that the priming

(1) 3 Wils. 403; 2 W. Bl. 892. (2) 5 M. & S. 198.

had been properly removed—"the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly; but I think the action is maintainable."

In *Ilott* v. *Wilkes* (1)—the well-known case as to spring-guns—it became unnecessary to determine how far a person setting spring-guns would be liable to a person injured by such a gun going off, even though such person were a trespasser, inasmuch as the plaintiff, having had notice that spring-guns were set in a particular wood, had voluntarily exposed himself to the danger. But both Mr. Justice Bayley and Mr. Justice Holroyd appear to have thought that without such notice the action would have lain, the use of such instruments being unreasonably disproportioned to the end to be obtained, and dangerous to the lives of persons who might be innocently trespassing. Looking to their language, it can scarcely be doubted that if, instead of injuring the plaintiff, the gun which he caused to go off had struck a person passing lawfully along a path leading through the wood, they would have held the defendant liable.

In *Jordin* v. *Crump* (2) the use of dog-spears was held not illegal; but there the injury done to the plaintiff's dog was alone in question. If the use of such an instrument had been productive of injury to a human being, the result might have been different.

In *Illidge* v. *Goodwin* (3) the defendant's cart and horse were left standing in the street without anyone to attend to them. A person passing by whipped the horse, which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the horse, and not the defendant, was liable. It was also contended that the bad management of the plaintiff's shopman had contributed to the accident. But Tindal, C.J., ruled that, even if this were believed, it would not avail as a defence. "If," he says, "a man chooses to leave a cart standing on the street, he must take the risk of any mischief that may be done." *Lynch* v. *Nurdin* (4) is a still more striking case. There, as in the former case, the defendant's cart and horse had been left standing un-

(1) 3 B. & A. 304.
(2) 8 M. & W. 782.
(3) 5 C. & P. 192.
(4) 1 Q. B. D. 29.

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attended in the street. The plaintiff, a child of seven years of age, playing in the street with other boys, was getting into the cart when another boy made the horse move on. The plaintiff was thrown down, and the wheel of the cart went over his leg and fractured it. A considered judgment was delivered by Lord Denman. He says, "It is urged that the mischief was not produced by the mere negligence of the servant as asserted in the declaration, but at most by that negligence in combination with two other active causes, the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart and committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell on it at any length. For if I am guilty of negligence in leaving anything dangerous where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." And then, by way of illustration, the Chief Justice puts the case of a gamekeeper leaving a loaded gun against the wall of a play-ground where school boys were at play, and one of the boys in play letting it off and wounding another. "I think it will not be doubted," says Lord Denman, "that the gamekeeper must answer in damages to the wounded party." "This," he adds, "might possibly be assumed as clear in principle, but there is also the authority of the present Chief Justice of the Common Pleas in its support in *Illidge* v *Goodwin*." (1) It is unnecessary to follow the judgment in the consideration of the second part of the case, namely, whether the plaintiff, having contributed to the accident by getting into the cart, was prevented from recovering in the action, as no such question arises here. In *Daniels* v. *Potter* (2) the defendants had a cellar opening to the street. The flap of the cellar had been set back while the defendants' men were lowering casks into it, as the plaintiff contended, without proper care having been taken to secure it; the flap fell and injured the plaintiff. The defendant maintained that the flap had been properly fastened, but also set up

(1) 5 C. & P. 190. (2) 4 C. & P. 262.

as a defence that its fall had been caused by some children playing with it. But the only question left to the jury by Tindal, C.J., was whether the defendants' men had used reasonable care to secure the flap. His direction implies that in that case only would the intervention of a third party causing the injury be a defence.

The cases of *Hughes* v. *Macfie and Others* (1) and *Abbott* v. *Macfie and Others* (2), two actions arising out of the same circumstances, and tried in the Passage Court at Liverpool, though at variance with some of the foregoing, so far as relates to the effect on the plaintiff's right to recover where his own act as a trespasser has contributed to the injury of which he complains, is in accordance with them as respects the defendant's liability for his own act, where that act is the primary cause, though the act of another may have led to the immediate result.

The defendants had a cellar opening to the street. Their men had taken up the flap of the cellar for the purpose of lowering casks into it, and, having reared it against the wall nearly upright with its lower face, on which there were cross-bars, towards the street, had gone away. The plaintiff in one of the actions, a child five years old, got upon the cross-bars of the flap, and in jumping off them brought down the flap on himself and another child, the plaintiff in the other action, and both were injured. It was held, that while the plaintiff whose act had caused the flap to fall could not recover, the other plaintiff who had been injured could, provided he had not been playing with the other so as to be a joint actor with him.

Bird v. *Holbrook* (3) is another striking case, as there the plaintiff was undoubtedly a trespasser. The defendant being the owner of a garden, which was at some distance from his dwelling-house, and which was subject to depredations, had set in it without notice a spring-gun for the protection of his property. The plaintiff, who was not aware that a spring-gun was set in the garden in order to catch a peafowl, the property of a neighbour, which had escaped into the garden, got over the wall, and his foot coming, in his pursuit of the bird, into contact with the wire which communicated with the gun, the latter went off and

(1) 2 H. & C. 744; 33 L. J. (Ex.) 177.
(2) 2 H. & C. 744; 33 L. J. (Ex.) 177. (3) 4 Bing. 628.

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injured him. It was held, though his own act had been the immediate cause of the gun going off, yet that the unlawful act of the defendant in setting it rendered the latter liable for the consequences.

In the course of the discussion a similar case of *Jay* v. *Whitfield* (1) was mentioned—tried before Richards, C.B.,—in which a plaintiff who had trespassed upon premises in order to cut a stick and had been similarly injured, had recovered substantial damages, and no attempt had been made to disturb the verdict.

In *Hill* v. *New River Company* (2) the defendants created a nuisance in a public highway by allowing a stream of water to spout up open and unfenced in the road. The plaintiff's horses passing along the road with his carriage took fright at the water thus spouting up, and swerved to the other side of the road. It so happened that there was in the road an open ditch or cutting, which had been made by contractors who were constructing a sewer, and which had been left unfenced and unguarded, which it ought not to have been. Into this ditch or cutting, owing to its being unfenced, the horses fell, and injured themselves and the carriage. It was contended that the remedy, if any, was against the contractors; but it was held that the plaintiff was entitled to recover against the company.

In *Burrows* v. *March Gas and Coke Company* (3) it was held in the Exchequer Chamber, affirming a judgment of the Court of Exchequer, that where, through a breach of contract by the defendants in not serving the plaintiff with a proper pipe to convey gas from their main into his premises, an escape of gas had taken place, whereupon the servant of a gasfitter at work on the premises having gone into the part of the premises where the escape had occurred, with a lighted candle, and examining the pipe with the candle in his hand, an explosion took place, by which the premises were injured, the defendants were liable, though the explosion had been immediately caused by the imprudence of the gasfitter's man in examining the pipe with a lighted candle in his hand.

In *Collins* v. *Middle Level Commissioners* (4) the defendants

(1) At p. 644.
(2) 7 B. & S. 308.
(3) Law Rep. 7 Ex. 96.
(4) Law Rep. 4 C. P. 279.

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were bound under an Act of Parliament to construct a cut with proper walls, gates, and sluices, to keep out the waters of a tidal river, and also a culvert under the cut, to carry off the drainage of the lands lying east of the cut, and to keep the same open at all times. In consequence of the defective construction of the gates and sluices, the waters of the river flowed into the cut, and, bursting its western bank, flooded the adjoining lands. The plaintiff and other proprietors on the eastern side closed the culvert, and so protected their lands; but the proprietors on the western side, to lessen the evil to themselves, reopened the culvert, and so increased the overflow on the plaintiff's land, and caused injury to it. The defendants sought to ascribe the injury to the act of the western proprietors in removing the obstruction which those on the other side had placed at the culvert. But it was held that the negligence of the defendants was the substantial cause of the mischief. "The defendants," says Mr. Justice Montague Smith, "cannot excuse themselves from the natural consequences of their negligence by reason of the act, whether rightful or wrongful, of those who removed the obstruction placed in the culvert under the circumstances found in this case." "The primary and substantial cause of the injury," says Mr. Justice Brett, "was the negligence of the defendants, and it is not competent to them to say that they are absolved from the consequences of their wrongful act by what the plaintiff or someone else did."—"I cannot see how the defendants can excuse themselves by urging that the plaintiff was prevented by other wrongdoers from preventing a part of the injury."

The case of *Harrison* v. *Great Northern Railway Company* (1) belongs to the same class. The defendants were bound under an Act of Parliament to maintain a delph or drain with banks for carrying off water for the protection of the adjoining lands. At the same time certain commissioners, appointed under an Act of Parliament, were bound to maintain the navigation of the river Witham, with which the delph communicated. There having been an extraordinary fall of rain, the water in the delph rose nearly to the height of its banks, when one of them gave way and caused the damage of which the plaintiff complained. It

(1) 3 H. & C. 231; 33 L. J. (Ex.) 266.

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was found that the bank of the delph was not in a proper condition, but it was also found, and it was on this that the defendants relied as a defence, that the breaking of the bank had been caused by the water in it having been penned back, owing to the neglect of the commissioners to maintain in a proper state certain works which it was their duty to keep up under their Act. Nevertheless, the defendants were held liable.

These authorities would appear to be sufficient to maintain the plaintiff's right of action under the circumstances of this case. It must, however, be admitted that in one or two recent cases the Courts have shewn a disposition to confine the liability arising from unlawful acts, negligence, or omissions of duty within narrower limits, by holding a defendant liable for those consequences only which in the ordinary course of things were likely to arise, and which might therefore reasonably be expected to arise, or which it was contemplated by the parties might arise, from such acts, negligence, or omissions. In *Greenland* v. *Chaplin* (1) Pollock, C.B., says: "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated." Acting on this principle, the Court of Common Pleas, in a recent case of *Sharp* v. *Powell* (2), held that the action would not lie where the injury, though arising from the unlawful act of the defendant, could not have been reasonably expected to follow from it. The defendant had, contrary to the provisions of the Police Act, washed a van in the street, and suffered the water used for the purpose to flow down a gutter towards a sewer at some little distance. The weather being frosty, a grating, through which water flowing down the gutter passed into the sewer, had become frozen over, in consequence of which the water sent down by the defendant, instead of passing into the sewer, spread over the street and became frozen, rendering the street slippery. The plaintiff's horse coming along fell in consequence, and was injured. It was held that as there was nothing to shew that the defendant was aware of the obstruction of the grating, and as the stoppage of the water was not the

(1) 5 Ex. 243, at p. 248. (2) Law Rep. 7 C. P. 253.

necessary or probable consequence of the defendant's act, he was not responsible for what had happened.

Bovill, C.J., there says: "No doubt, one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom, but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such act, unless it be shewn that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrongdoer liable to an action." And Grove, J., said: "I am entirely of the same opinion. I think the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated, or for which he is responsible. The expression, the 'natural' consequence, which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant; 'probable' would perhaps be a better expression. If on the present occasion the water had been allowed to accumulate round the spot where the washing of the van took place, and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have been inclined to think that the defendant would have been responsible for the consequences which had resulted." And Mr. Justice Keating said: "The damage did not immediately flow from the wrongful act of the defendant, nor was such a probable or likely result as to make him responsible for it. The natural consequence, if that be a correct expression, of the wrongful act of the defendant would have been that the water would under ordinary circumstances have flowed along the gutter or channel, and so down the grating to the sewer. The stoppage and accumulation of the water was caused by ice or other obstruction at the drain, not shewn to have been known to the defendant,

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and for which he was in no degree responsible. That being so, it would obviously be unreasonable to trace the damage indirectly back to the defendant."

We acquiesce in the doctrine thus laid down as applicable to the circumstances of the particular case, but we doubt its applicability to the present, which appears to us to come within the principle of *Scott* v. *Shepherd* (1) and *Dixon* v. *Bell* (2), and the other cases to which we have referred. At the same time, it appears to us that the case before us will stand the test thus said to be the true one. For a man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction, by some one entitled to use the way, as a thing likely to happen; and if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near; thus, if the obstruction be to the carriageway, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that, if a person places a dangerous obstruction in a highway, or in a private road, over which persons have a right of way, he is bound to take all necessary precaution to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences. It is unnecessary to consider how the matter would have stood had the plaintiff been a trespasser. The case of *Mangan* v. *Atterton* (3) was cited before us as a strong authority in favour of the defendant. The defendant had there exposed in a public market-place a machine for crushing oilcake without its being thrown out of gear, or the handle being fastened, or any person having the care of it. The plaintiff, a boy of four years of age, returning from school with his brother, a boy of seven, and some other boys, stopped at the machine. One of the boys began to turn the handle; the plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheels, and the machine being

(1) 3 Wils. 403; 2 W. Bl. 892. (2) 5 M. & S. 198.
(3) 4 H. & C. 388; Law Rep. 1 Ex. 239.

set in motion, three of his fingers were crushed. It was held by the Court of Exchequer that the defendant was not liable, first, because there was no negligence on the part of the defendant, or, if there was negligence, it was too remote; and secondly, because the injury was caused by the act of the boy who turned the handle, and of the plaintiff himself, who was a trespasser. With the latter ground of the decision we have in the present case nothing to do; otherwise we should have to consider whether it should prevail against the cases cited, with which it is obviously in conflict. If the decision as to negligence is in conflict with our judgment in this case, we can only say we do not acquiesce in it. It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion. But be this as it may, the case cannot govern the present. For the decision proceeded expressly on the ground that there had been no default in the defendant; here it cannot be disputed that the act of the defendant was unlawful.

On the whole, we are of opinion, both on principle and authority, that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

Solicitor for plaintiff: *J. C. Button.*
Solicitor for defendant: *J. H. Williams.*

1877
Dec. 19.

[IN THE COURT OF APPEAL.]

DOYLE *v.* KAUFMAN.

Practice—Writ of Summons, Renewal of—Time, Extension of—Statute of Limitations (21 *Jac.* 1, *c.* 16).

Semble, the time for renewing a writ of summons cannot be extended under Order LVII., Rule 6, where the plaintiff's claim would, in the absence of such renewal, be barred by the Statute of Limitations (21 Jac. 1, c. 16).

APPEAL from the decision of the Queen's Bench Division (1) refusing an application to renew a writ of summons after the period of twelve months had elapsed. The plaintiff's claim was at the date of the application barred by the Statute of Limitations.

The plaintiff, a solicitor, had instructed his managing clerk to renew the writ under Order VIII., Rule 1. The clerk failed to do so, and was subsequently dismissed. Before the twelve months had expired, the plaintiff became aware that the clerk had omitted to renew the writ.

Willis, Q.C., for the plaintiff, cited *Lakin* v. *Watson* (2), *Culverwell* v. *Nugee* (3), and *Cornish* v. *Hocking*. (4)

THE COURT (Bramwell, Brett, and Cotton, L.JJ.) intimated that in their opinion the principle of the judgment in the Queen's Bench Division was right, but dismissed the application on the ground that the plaintiff himself had been guilty of such laches as disentitled him to a renewal of the writ.

Appeal dismissed.

Solicitors for plaintiff: *E. Doyle & Sons.*

(1) Ante, p. 7.
(2) 2 C. & M. 685.
(3) 15 M. & W. 559.
(4) 1 E. & B. 602; 22 L. J. (Q.B.) 142.

FRANCIS, APPELLANT; MAAS AND OTHERS, RESPONDENTS. 1878

Adulteration—Adulteration of Seeds Act (32 & 33 *Vict. c.* 112), *s.* 2—*Dyeing Seeds—Seeds of "another kind."* *Feb.* 21.

Under 32 & 33 Vict. c. 112, which by s. 2 defines the term "to dye seeds," as giving to seeds by any process of colouring, dyeing, sulphur smoking, or other artificial means, the appearance of seeds of another kind, and by s. 3 imposes a penalty upon any person, who with intent to defraud, "dyes any seeds, or sells any dyed seed," no offence is committed by subjecting seeds to a process by sulphur smoking, so as to improve them in appearance, and to make old and inferior seed appear to be new seed, so long as such seed is not made to appear of a different species or description from that to which it actually belongs.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

The defendants, seed merchants, appeared to a summons taken out against them by Alexander Francis, under the Seeds Adulteration Act, 32 & 33 Vict. c. 112 (1): "For that they did unlawfully with intent to enable some other person to defraud, cause to be dyed certain seeds within the true intent and meaning of the Act, viz., clover seeds," &c.

It was proved that the defendants had, in fact, submitted the seeds in question to a certain process of sulphur smoking, whereby their appearance had been greatly improved, and that, in short, a very inferior and comparatively worthless sample of old clover seed had by the process been made to resemble new and valuable clover seed; but it was not proved nor alleged that there was any representation that the seed was other in sort than what it really was, viz., clover seed.

In the interpretation clause of the Act "the term to dye seeds means to give to seeds, by any process of colouring, dyeing, sulphur smoking, or other artificial means, the appearance of

(1) By "The Adulteration of Seeds Act, 1869," 32 & 33 Vict. c. 112, s. 2, the term "to dye seeds," means to give to seeds, by any process of colouring, dyeing, sulphur smoking, or other artificial means, the appearance of seeds of another kind.

By s. 3: Every person who with intent to defraud, or to enable another person to defraud, does any of the following things, that is to say (2), dyes, or causes to be dyed, any seeds, or (3) sells, or causes to be sold, any . . . . dyed seeds, shall (1), for the first offence, be liable to a penalty not exceeding 5*l.*

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seeds of another kind." It was argued for the complainant that these words would include manipulation of seeds by such process or artificial means, in order fraudulently to present the appearance of improved quality.

The magistrate was of opinion that the words of the statute, "seeds of another kind," meant a totally different thing from old and inferior seeds of the same kind, altered so as to pass for new and reliable seeds, and holding that the conduct of the defendants, however reprehensible, did not bring them within the penalties of the Act, he dismissed the summons.

G. E. Lyon, for the respondents. The magistrate was right. What was done to the clover seed did not give it the appearance of seed of another kind, taking the word "kind" in its ordinary meaning. No foreign substance was mixed with it, and it could never be supposed to be anything but clover seed. [He was then stopped.]

Grain, for the appellant. There can be no doubt of the fraudulent intention of the appellants, and if by some process inferior seed is to be made to look like that which it is not—seed of a superior quality—the case is within the Act. Smoking the seed with sulphur is much the same as if another seed were actually mixed with it.

COCKBURN, C.J. I regret that I am compelled to arrive at the conclusion that this case is not within the Act. There can be no doubt that what was done was a wicked fraud, which ought to be provided against by the legislature; but we cannot, without doing violence to the language of the section before us, hold that the respondents were liable. We are called upon to say whether the facts bring the case within a penal act, and whether it embraces the particular fraud which is shewn to have been practised. The preamble of the Act states that the practice of adulterating seeds, in fraud of her Majesty's subjects, and to the great detriment of agriculture, requires to be repressed by more effectual laws, &c., and it proceeds to impose a penalty upon any one who dyes seeds, so as to give them the appearance of seeds of another kind. Now, construing the word "kind," according to the meaning given to it

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in the standard dictionaries, the Act cannot be taken to apply to something done with the object of improving the appearance of the seed without introducing foreign substances in it, and passing it off as a thing substantially different from that which it is. Here nothing of the character of admixture takes place. The seeds are not made to assume the appearance of seeds of a kind other than they are, that is white clover seed. The words, "another kind," do not apply to a mere improvement in appearance, and nothing could have been easier than for the legislature to have included this case in the enactment. Without express words I do not think that we can treat the word "quality" as synonymous with "kind." The seeds always retained the appearance of that which they actually were, and it was not the case of the seeds of some noxious weed being made to acquire the appearance of the seeds of some other plant. They were only altered as regards quality.

MANISTY, J. I share the regret expressed by the Lord Chief Justice in holding that this information cannot succeed. The preamble is a key to the construction of the Act, though there is of course nothing to prevent a clause from going further. Now the preamble suggests that the Act was aimed at the adulteration of seeds, and though the word "kind," which is used afterwards, is not free from ambiguity, it ought not, if there is real doubt, be construed so as to create an offence and impose a penalty. Now, reading the enactment in conjunction with the interpretation clause, I think the natural conclusion is that it applies to something which makes the seeds appear to be of a different sort from that which they are, and not to something which merely gives them the appearance of seed of a better quality.

Judgment for the respondents.

Solicitors for appellant: *Tahourdins & Hargreaves.*
Solicitors for respondents: *Simpson & Palmer.*

1878
May 5.

GUARDIANS OF KEYNSHAM UNION, APPELLANTS; GUARDIANS OF BEDMINSTER UNION, RESPONDENTS.

Poor Law—Divided Parishes Act (39 & 40 *Vict. c.* 61), *s.* 35—*Child under Sixteen—Mother Marrying again.*

9 Q B D 777
781

Under the Divided Parishes Act (39 & 40 Vict. c. 61), s. 35, which enacts that—no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another—children under the age of sixteen gain no settlement by a second marriage of their widowed mother.

UPON an appeal to the Somersetshire Quarter Sessions against an order for the removal of three paupers—Mary Ann Fuse, Edwin George Fuse, and Sarah Jane Fuse—from the respondents' union to the appellants' union, as the place of their last legal settlement; the order was confirmed subject to the following case:—

1. Samuel Fuse, the father of the paupers, was born in the parish of Bitton, in the appellants' union, in 1832.

2. Ann Woodrington, the mother of the paupers, was born in the parish of Siston, in the appellants' union, on or about the 20th of August, 1839.

3. Samuel Fuse and Ann Woodrington intermarried in 1859.

4. The three paupers are the children of the above-named Samuel Fuse and Ann his wife, and were born at Caerphilly, in the Ponty-pridd Union, and are all under sixteen years of age, and unemancipated.

5. Samuel Fuse died in the year 1873, leaving his widow, Ann Fuse (formerly Ann Woodrington) and the three paupers him surviving.

6. In 1875 Ann Fuse, the widow of Samuel Fuse, married Alfred Warden.

7. Alfred Warden was born in the parish of Thornbury in the Thornbury Union, on or about the 5th of August, 1839.

8. Alfred Warden deserted his wife and her children, the

paupers, in September, 1876, leaving them chargeable to the respondents' union.

9. The respondents' union obtained an order on the 1st of June, 1877, for the removal of Ann Warden, the mother of the paupers, to Thornbury Union, which said order has not been appealed against.

If the Court should be of opinion, upon the facts above stated, that the last legal place of settlement of the three paupers was in the appellants' union, the order of removal and the order of sessions are to be confirmed.

If the Court should be of a contrary opinion, the order of removal and the order of sessions are to be quashed.

Hooper (*Vigor* with him) for the respondents. Under 39 & 40 Vict. c. 61, s. 35 (1), the paupers took the settlement of Samuel Fuse, their father, and gained no settlement by the second marriage of their mother. This no doubt would have been the case before the Act: *Woodend* v. *Paulspury* (2); *St. Giles in the Fields* v. *St. Clements* (3); and the Act has made no change in the law.

[MELLOR, J. The moment the widow marries again the settlement ceases to be the settlement of "the widowed mother."]

It is impossible to read the section in such a manner as to warrant the construction put upon it by the appellants.

Petheram, for the appellants. The settlement of the widowed mother is actually that which she has derived from her second husband, and it has always been the policy of the legislature that children should not be separated from their parents.

(1) By 39 & 40 Vict. c. 61, s. 35, no person shall be deemed to have derived a settlement from any other person whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. . . . If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have acquired a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, shall be deemed to be settled in the parish in which he or she was born.

(2) 2 Ld. Raym. 1473.

(3) Burr. S. C. 2.

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PER CURIAM (Mellor, J., and Lush, J.). The words of the section make it impossible to hold that the children gained any settlement by the second marriage of their mother.

Judgment for the respondents. Order of Sessions confirmed.

Solicitors for appellants: *White & Sons, for Stanley & Wasbrough, Bristol.*

Solicitors for respondents: *Guscotte, Wadham, & Daw, for O'Donoghue & Anson, Bristol.*

Jan. 31.

PALMER, APPELLANT; THATCHER, RESPONDENT.

Wine—Sale of by Grocer off Premises—Certificate from Justices, how far necessary—Wine Dealer's Licence—6 *Geo.* 4, *c.* 81, *s.* 2—23 & 24 *Vict. c.* 27, *s.* 3—32 & 33 *Vict. c.* 27, *ss.* 4, 5—35 & 36 *Vict. c.* 94, *ss.* 3, 73, 74.

A shopkeeper, holding a wine dealer's Excise licence, granted under 6 Geo. 4, c. 81, s. 2, and for which the annual duty of 10*l.* 10*s.* is payable, is entitled, without any certificate from justices, to sell by retail wine to be consumed off his premises.

CASE stated by Justices of Bristol, under 20 & 21 Vict. c. 43.

[A rule had also been obtained calling upon the same justices to shew cause why a certiorari should not issue to bring up a conviction in order that it might be quashed.]

On information preferred by the respondent, under the 3rd section of the Licensing Act, 1872, charging that the appellant, at Regent Street, in the parish of Clifton, Bristol, unlawfully did sell and expose for sale by retail certain intoxicating liquor, to wit, a quantity of beer and wine, without being then and there duly licensed to sell the same; the appellant was convicted in the penalty of 5*s.* and costs.

The information was laid under the 3rd section of the Licensing Act, 1872. (1)

(1) By 6 Geo. 4, c. 81, s. 2, the following Excise duty is imposed on wine:—"Every dealer in foreign wine who shall not have an Excise licence for retailing spirits and a licence for retailing beer—10*l.*"

By s. 3 & 4 Vict. c. 17, the above duty of 10*l.* is increased to 10*l.* 10*s.*

By the Wine Licenses and Refreshment Houses Act, 1860, 23 Vict. c. 27, s. 1, a duty of 2*l.* 2*s.*, or 3*l.* 3*s.*, according to the value of the premises, is imposed

The appellant carries on business as a grocer at 7, Regent Street, Clifton, in the city and county of Bristol.

On the 6th of July a constable, acting under the orders of the respondent, a police superintendent, went to appellant's shop, in which there were several cards relating to the sale of various foreign wines, and pointing to one bearing the following words, "Sherry, 21*s.* per dozen; 1*s.* 9*d.* per bottle," asked for a bottle, for which he paid the appellant 1*s.* 11*d.*, of which 2*d.* was charged for the bottle. The bottle was a reputed quart bottle, and when opened was found to contain sherry. The sale of the bottle of sherry was made for consumption not on the premises.

The constable, after making the purchase, asked the appellant if he had a licence, and he produced one which had been granted to him under 6 Geo. 4, c, 81, of which the following is a copy :—

"No. 112.

"Great Britain.

"Dealer's Licence. No. 312.

"I, the undersigned, duly authorized by the Commissioners of Inland Revenue, hereby grant license to Richard A. Palmer to

for every licence to be taken out by any person for the selling by retail in any shop of foreign and British wine not to be consumed in the house, or shop, or on the premises where sold.

By s. 3, every person who shall keep a shop for the sale of any goods or commodities other than foreign wine, or who shall have taken out a licence as a dealer in wine, shall, without producing or having any other licence or authority, be entitled to take out a licence under this Act to sell by retail, and in reputed quart or pint bottles only, in such shop, foreign wine not to be consumed on the premises where sold.

By 32 & 33 Vict. c. 27, ss. 4, 5, no licence or renewal of a licence for the sale by retail of beer, cider, wine, &c., under the provisions of any of the recited Acts [which include 23 Vict. c. 27, but not 6 Geo. 4, c. 81] is to be granted except upon the production of a certificate to be granted by the justices at the general annual licensing meeting.

By the Licensing Act, 1872, 35 & 36 Vict. c. 94, s. 3, no person shall sell or expose for sale by retail any intoxicating liquor, without being duly licensed to sell the same, or at any place where he is not authorized by his licence to sell the same. By s. 74, "licence" means a licence for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquor Licensing Act, 1828, including a certificate of justices granted under the Wine and Beerhouse Acts. By s. 73, a licence as defined by this Act shall not be required for "The sale of wine by retail not to be consumed on the premises, by a wine merchant, in pursuance of a wine dealer's licence granted by the Commissioners of Inland Revenue."

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exercise and carry on the trades, and to sell the intoxicating liquors undermentioned in the manner hereinafter described, at a house situated at 7, Regent Street, in the parish of Clifton, in the county of Bristol, from the day of the date hereof until and including the 5th of July next ensuing, he having paid for this licence, the undermentioned duties in respect of the several licences to exercise the said trades, and which amount altogether to the sum of 6*l.* 18*s.* 0¾*d.*

"Dated this 29th of January, 1877.

	£	*s.*	*d.*
"Dealer in Foreign Wine, and in Sweets or made Wines]	5	5	0
"Dealer in Beer	1	13	0¾
	£6	18	0¾

"J. Drinkwater,
"Collector of Inland Revenue.

"Note.—Any authority granted by this licence, which is founded upon a magisterial certificate, will cease if the magisterial certificate is forfeited, in pursuance of the Licensing Act, 1872, or become void under any other provisions of that Act (see 35 & 36 Vict. c. 94, s, 63).

"(1). The spirit dealer's licence does not authorize the sale of less than two gallons of spirits of the same denomination at a time to the same person.

"(2). The beer dealer's licence does not authorize the sale of less than four gallons and a half, or two dozen reputed quart bottles."

There were also cards in the shop announcing the sale of ale and stout in quantities of not less than three dozen imperial pint bottles. There were also bottles of ale and stout as well as foreign wine in bins in the shop, which was otherwise fitted up as an ordinary grocer's shop, with tea, sugar, eggs, and dried fruits exposed for sale.

After this, on the same day, the 6th of July, the respondent laid an information before one of the justices for the city and

county, and obtained a search warrant under the provisions of the 17th section of the Licensing Act, 1874.

The warrant was put in force the same evening, and in the shop about three dozen bottles of foreign wine were found, in the house, in upstairs rooms, over twenty dozen bottles of champagne, fifty dozen of port, sherry, and claret, and about five dozen of ginger, orange, and other British wines were found, and in the basement seventeen casks of beer, ale, and stout, and 209 dozen of bottled ale and stout were found. These liquors, with the vessels containing the same, were seized by the police and were removed from the premises under the warrant.

Subsequently the appellant was summoned, as hereinbefore mentioned, and on the hearing, on the 10th of July, himself gave evidence, and called witnesses who proved that a new licence was ready for delivery to the appellant to enable him to sell as a dealer in foreign wines from the 6th of July, 1877, similar to the licence which expired on the 5th of July. That it was not usual to renew on the 6th of July, and, for the convenience of the Inland Revenue officers, notice had been given to the appellant requesting him to attend at the Inland Revenue Office, Bristol, and pay his duties on the 13th of July, 1877.

The appellant had been informed by the Excise officers that having a licence as a dealer in foreign wines he could sell such wines for consumption off the premises in any quantity however large or small. And the justices found that he had an honest belief he could do so. It was also proved that the Inland Revenue Office was in the habit of granting a wine dealer's licence to any keeper of a shop who applied for it, and informing the holder thereof that it authorized the sale of wine in any quantity however small, although he had not previously obtained any licence from justices.

It was not proved that the appellant ever sold so much as two gallons of foreign wine at one time, or so much as one dozen reputed quart bottles at one time, and the justices found, as a fact, that he was in the habit of selling foreign wine by retail, not to be consumed on the premises.

The appellant never sold less than three dozen imperial pint bottles of beer at one time.

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The appellant was brought up as a grocer, and had never been in a wine merchant's business, except in connection with the grocery trade.

The appellant would have to pay to the revenue 10*l.* 10*s.* for an annual licence as a dealer in foreign wines, but for a retail licence under 23 Vict. c. 27, s. 3, he would have to pay to the revenue 3*l.* 3*s.*

He had no such retail licence, and he had no licence or certificate from the justices.

The appellant contended that he was entitled to sell by retail foreign wines, although he had no other licence except a "dealer's licence," before described, and that he must be considered as having such a licence at the time he sold to the constable the bottle of sherry, because the new licence was in existence, and it was not through any negligence of his that it was not in his actual possession.

The appellant also contended that every person who deals in wine, although dealing at the same time in other commodities, is a "wine merchant," within the meaning of sub-s. 1 of the 73rd section of the Licensing Act, 1872, and that provided he holds a wine dealer's licence, no licence from the magistrates was required.

And further the appellant contended that having a licence as a dealer in foreign wines, under 6 Geo. 4, c. 81, he did not require any other licence or authority under 23 Vict. c. 27, s. 3, and in support of his contention he referred to the statute of 6 Geo. 4, c. 81, and to the following documents and opinions of the Inland Revenue Commissioners, and forming the instructions of the commissioners to their officers.

"Somerset House, London,
"5th March, 1863.

"ORDERED—

"That the several officers of the revenue take notice that licensed dealers in foreign wine are *not* required to take out a licence under 23 Vict. c. 27, for the sale of such wines by retail, and that they may sell in *any quantity* in the same manner as they did previously to the passing of that Act.

"By the board, Thomas Dobson."

"Somerset House, London,
"31st August, 1872.

"ORDERED—

"No justice's or Excise licence is required for the sale of spruce, or black beer. Neither is a justice's licence required for the retail of wine *not* to be consumed on the premises under an Excise wine dealer's licence at 10*l*. 10*s*.

"By the board, Adam Young."

The justices decided, so far as it was a question of fact and material, that the appellant was not a "wine merchant" within the meaning of s. 73 of the Licensing Act, 1872, but that he was a grocer, and kept a shop for the sale of goods and commodities, other than foreign wine, within the meaning of s. 3 of 23 Vict. c. 27, and that on the day in question he sold foreign wine by retail according to the definition contained in s. 4 of the same Act, and that his trade in wine consisted in selling wine by retail as so defined.

They considered that the appellant had a "wine dealer's licence" on the 6th of July, although he had not actual possession of it on that day, but they convicted him of selling intoxicating liquors, to wit, foreign wine by retail without having a licence contrary to s. 3 of the Licensing Act, 1872, because they were of opinion that the dealer's licence did not justify such sale by retail as he was not a "wine merchant."

They were of opinion that under the circumstances stated in this case he ought to have obtained a licence from the justices as contended by the respondent.

If they had any discretion as to the forfeiture of the intoxicating liquor seized by the police, they would not have ordered it to be forfeited, but, having regard to s. 17 of the Licensing Act, 1874, they made no order on the subject.

The questions for the decision of the Court are—

(1.) Whether the appellant was a wine merchant within the meaning of the 73rd section of the Licensing Act, 1872?

(2.) Whether upon the facts stated the justices were right in holding that the appellant was not entitled under the wine dealer's licence alone to sell foreign wine by retail in his shop, not to be consumed on the premises?

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Herschell, Q.C. (*Paterson* and *Petheram* with him), argued for the appellant, and supported the rule for the certiorari. The question, which is one of great general importance, is whether the holder of a wine dealer's Excise licence under 6 Geo. 4, c. 81, s. 2, is, though he has no certificate from justices, "duly licensed" within the meaning of 35 & 36 Vict. c. 94, s. 3. The latter Act gives no definition of what constitutes "due licensing." The interpretation clause, s. 74, defines "licensed person" as a person holding a licence as defined by the Act, and "licence" is made to include several descriptions of licence; but there is no reference to 6 Geo. 4, c. 81, which must be taken to be beyond the operation of 35 & 36 Vict. c. 94. Moreover, there is in 35 & 36 Vict. c. 94, s. 73, an express statement that a licence, as defined by the Act, shall not be required for the sale of wine by retail, not to be consumed on the premises, by a wine merchant in pursuance of a wine dealer's licence granted by the Commissioners of Inland Revenue.

[COCKBURN, C.J. Can the appellant be regarded as a wine merchant?]

Yes; but whether he is a wine merchant or not, the legislature did not intend to interfere with the rights conferred by a wine dealer's licence under 6 Geo. 4, c. 81. No reason for requiring such a dealer to procure a certificate from justices can be suggested; they would never refuse a grocer a licence to sell wine off his premises. The later Act does indeed impose an express restriction on spirit dealers, who are only to sell by retail on premises occupied and used exclusively for the sale of intoxicating liquor. Again, the Act 6 Geo. 4, c. 81, is general in its terms, enabling the dealer to sell by wholesale or retail; while under 23 & 24 Vict. c. 27 he must take out two licences, one to sell wholesale and another retail.

Charles, Q.C. (*H. D. Greene* with him), argued for the respondent, and *Poland*, for the justices, shewed cause against the rule. The appellant could not sell wine by retail without a certificate from the justices. The Act 32 & 33 Vict. c. 27, first placed licences for the sale of wine wholesale and retail under the control of the magistrates. It is true that s. 4 describes the licences, for which a certificate from justices is a preliminary condition, by reference to Acts which do not include 6 Geo. 4, c. 94; but the Refreshment

Houses Act, 23 Vict. c. 27 is among them, and it is quite clear that this Act applies to dealers in wine licensed like the appellant, and after it became law it was necessary that a shopkeeper wishing to sell by retail should obtain a licence under s. 3. If, therefore, the appellant, in order to be "duly licensed," is bound to take out a licence under 23 Vict. c. 27, i.e., one of the recited Acts, he must procure a certificate from justices. A strong reason for giving the justices control over such licences is to be found in the general belief that the sale of wine in grocers' shops has tended to promote intemperance.

[COCKBURN, C.J. As I read the Refreshment Houses Act, it is confined to the case where a licence to sell by retail only is required. The Act of 6 Geo. 4 makes no distinction between selling wholesale or retail.]

Such a construction of the Act is inconsistent with the terms of s. 3. The holder of the licence under 6 Geo. 4 is to be entitled to take out a retail licence. This must mean, not that he has an option, but that he is bound to take out such a licence. Further, the appellant is not a wine merchant within the exception in s. 73. The same reasons for placing the sale of wine by retail under the control of the justices exist as in the case of beer and spirits.

With regard to the proceeding by certiorari, it is expressly taken away by 35 & 36 Vict. c. 94, s. 54, and it cannot be said that the justices acted without jurisdiction.

Paterson, in reply. The certiorari is not taken away, and was necessary, owing to the delay of the justices in stating the case.

COCKBURN, C.J. The question in this case has been made the subject of an exhaustive argument, but in reality lies in a nutshell. We must consider what the Acts of Parliament to which we have been referred actually say, and not enter upon some remote speculation as to what the legislature intended. The first statutory licence for dealing in wine to which we have been referred is that under 6 Geo. 4, c. 94. This Act made no difference between a licence to sell wholesale or retail. Then came the Refreshment Houses Act, 1860 (23 Vict. c. 27), which, amongst other things, enabled a licence to be taken out by any person for the selling by retail in any shop of foreign and British wine, when not to be

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consumed in the house or shop or on the premises where sold. But then there comes in s. 3 of that Act this provision, which would look at first as if it were necessary, in order to sell wine by retail, to take out a licence under this statute, i.e., a licence to sell by retail. It is that "every person who shall keep a shop for the sale of any goods or commodities other than foreign wine, or who shall" (which would be the case here) "have taken out a licence as a dealer in wine, shall, without producing or having any other licence or authority, be entitled to take out a licence under this Act to sell by retail, and in reputed quart or pint bottles only, in such shop, foreign wine not to be consumed on the premises where sold." Now it is true, that when you first look at this Act it is capable of a double construction; but when you look closer, and especially when it is read in connection with 35 & 36 Vict. c. 94, it will be seen that whereas before 23 Vict. c. 27 it was necessary, in order to sell wine at all, to take out a licence which enabled the holder to sell by wholesale or retail; now a man who does not wish to deal in wine wholesale or has part of his shop set apart for the sale of other commodities, or who has up to that time taken out a general licence, because he could take out no other, is entitled to take out a licence to sell by retail only. It is enough that he had a general licence which enabled him to sell by retail to entitle him to the lower licence at the lower rate of payment. Then comes the Act of 1869, and it is true that this Act made a certificate from justices a preliminary condition to the procuring a licence for the sale of wine. But this clearly applies to a licence to sell by retail, as distinguished from the case where a man who is in a larger way of business, is obliged to get a larger licence. This is entirely consistent with 35 & 36 Vict. c. 94, for amongst those exempted from the necessity of taking out a licence are persons who sell wine by retail, not to be consumed on the premises in pursuance of a wine dealer's licence granted by the Commissioners of Inland Revenue. The legislature, in my opinion, meant to create two forms of licence, so that a person who has taken out a wine merchant's licence is excluded from the operation of the Act, so far as it makes a certificate from justices necessary. I think, therefore, that the construction put upon the acts by the Commissioners of Excise, who no doubt were guided by good legal advice, was the right one.

With regard to the other point, I think that, as the case was pending when the rule nisi for the certiorari was obtained, we ought not to make it absolute; and it is unnecessary to consider whether the justices acted without jurisdiction, so as to override the clause taking away the certiorari. But having regard to the unnecessary delay in stating the case, and to the arbitrary and unnecessary seizure of the wine on the appellant's premises, I think this rule should be discharged without costs.

MANISTY, J. I am of the same opinion on both points. It would be scarcely contended that if the appellant had held his licence before the Act of 1860 passed, that he would not have been a wine merchant and grocer with authority to sell wine, and whether he sold by retail or by wholesale would be utterly immaterial. It would be an abuse of language to say that he was any the less a wine merchant because he kept a grocer's shop. Then in order to maintain the argument urged by the respondent, it would be necessary to contend that if he had had an unexpired licence when the Act of 1860 came into operation, he could not, after this Act came into operation, have gone on selling wine by retail, but must take out a new retail licence under the Act. One would expect to find an express enactment taking away the right for which he had paid. But the Act 23 Vict. c. 27, was not meant to vary existing rights, but simply meant to enable a different class of people to obtain a lower class of licence than had before existed, for which a smaller duty was payable, and it is with reference to this lower class of licences that the subsequent provisions for the preservation of order are made. I think, therefore, that our judgment should be for the appellant, and that the rule for the certiorari should be discharged without costs.

Judgment for the appellant; rule for certiorari discharged without costs.

Solicitors for appellant: *Darley & Cumberland, for J. H. Clifton, Bristol.*

Solicitors for respondent: *Gregory, Rowcliffes, & Co., for W. Benson, Bristol.*

Solicitor for the justices: *H. M. Phillips, for T. Gore, Bristol.*

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Feb. 14.

BULLOCK & CO. *v.* CORRY & CO.

Practice—Discovery—Correspondence in Suit between Plaintiff and Third Party—Order XXXI., Rules 11, 12, 13, 18.

In an action by the plaintiffs against the defendants for not unloading at the port of discharge a cargo of rice purchased by the defendants from the plaintiffs, whereby the plaintiffs, who had entered into a charterparty upon terms as to the discharge of the ship similar to those contained in the contract of sale, were sued by and had to pay damages to the shipowner:—

Held, that the defendants were not entitled to inspection of the papers in the plaintiffs' possession relating to the action brought against them by the shipowner, including correspondence between them and their solicitor, and between their solicitor and other persons; for such papers would have been privileged from discovery in the former action, and the fact that such action had terminated did not deprive them of their privilege.

CLAIM stating that the defendants purchased from the plaintiffs a cargo of rice, to arrive by a vessel thereafter to be declared, upon the terms, amongst others, that the vessel should be ordered at the defendants' option to any good and safe port in the United Kingdom, or on the continent, between Havre and Hamburg, both inclusive, or as near to such port as she could safely get without breaking bulk, and that the defendants should take the cargo from the ship's side as per charterparty, and should pay weighing, lighterage, &c. That for the purpose of performing this contract, the plaintiffs entered into a contract for the charter of the ship *Nydia*, upon terms as to the discharge of the ship similar to those contained in the contract. That a cargo was shipped by the *Nydia*, and the vessel was duly declared according to the terms of the contract by the plaintiffs with the defendants, and the defendants thereupon ordered the vessel to proceed to Ghent, and there discharge her cargo. The vessel accordingly proceeded as near to Ghent as she could safely get without breaking bulk, and all things happened, &c., to enable the plaintiffs to have the cargo taken by the defendants from the ship's side, and the defendants became and were bound to pay weighing, lighterage, &c., and all other expenses of the discharge of the cargo, according to the terms of their contract. Breach, that the defendants did not, nor would accept delivery of the cargo, nor take it from the

ship's side, and did not pay the weighing, lighterage, &c., and the other expenses of the discharge of the cargo according to the terms of the contract, whereby the plaintiffs were put to great expense, &c., and sustained a loss by the detention of the vessel through the defendants' breach of their contract, and were compelled to pay costs and charges in defending an action brought against them by the owner of the ship in respect of the default in the discharge of the vessel, and the defendants became liable to indemnify the plaintiffs in respect of all costs, charges, and expenses aforesaid, and the damages recovered against the plaintiffs in the aforesaid action.

The defendants by their defence denied the material allegations in the statement of claim, and further alleged that they were not the purchasers of the cargo, and acted in the transaction merely as brokers.

The plaintiffs admitted on affidavit the possession of the following documents—Correspondence between the plaintiffs and their solicitors relating to the questions in dispute in this action, and also the action of *Evans* [the shipowner] v. *Bullock;* correspondence between the plaintiffs' solicitors and Messrs. Bateson & Co. [Evans' solicitors]—but objected to the production of them, on the ground that they consisted of instructions to counsel, and the papers in this action, and in that brought by the shipowner against the now plaintiffs. A summons was taken out by the defendants before Field, J., calling upon the plaintiffs to shew cause why they should not produce for inspection the documents above-mentioned. The learned judge having dismissed the summons on the ground that the documents were privileged, the defendants appealed.

Maurice Powell (*Finlay* with him), in support of the motion. The papers are not privileged from inspection. They clearly relate to the matters in question in this action, and are of a similar character to the agreement of compromise in *Hutchinson* v. *Glover* (1), which was made in a previous action relating to the same subject-matter, but which was nevertheless held to be subject to inspection.

A. Wilson, for the plaintiffs. The defendants are not entitled to

(1) 1 Q. B. D. 138.

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inspection of a confidential correspondence in a previous action between the plaintiffs and a third person. The decisions in Equity shew that, although inspection is granted of documents which go to make up the record in an action, and also of the indorsements of counsel on a brief, yet that anything in the nature of private instructions for an action is privileged. This is distinctly shewn by the two cases of *Nicholl* v. *Jones* (1) and *Walsham* v. *Stainton* (2), where the reports of an accountant employed by a solicitor, instructions to counsel, and notes and observations made by him, were held to be privileged, and in the later case of *Wilson* v. *Northampton and Banbury Junction Railway* (3), the privilege was extended to correspondence with a solicitor upon a contract which had not then led to litigation. It may be assumed, therefore, that this application could not have been made while the action, "*Evans* v. *Bullock*" was in progress. But the present action involves the same question, and there is no reason why the privilege should be limited to an existing suit. In *Hutchinson* v. *Glover* (4) the agreement of compromise was an operative act, like the judgment of a Court, and could not be regarded as a private communication.

M. Powell, in reply. The papers are relevant to the defendants' case; for, had it not been for the previous action, the damages for breach of the defendants' contract would have been nominal.

COCKBURN, C.J. I entertain no doubt that my Brother Field was right. The privilege which attaches by the invariable practice of our courts to communications between solicitor and client ought to be carefully preserved. In my opinion the rule is, once privileged, always privileged. This will apply, à fortiori, where the succeeding action is substantially the same as that in which the documents were used. Let us suppose an action and cross-action to be brought between the same parties. Could it be said that what passed between the client and his solicitor in the action was not privileged from inspection in the cross-action? But this is substantially the same question which is now brought before us. In the first action the shipowners sued the charterer for not dis-

(1) 2 H. & M. 588.
(2) 2 H. & M. 1.
(3) Law Rep. 14 Eq. 477.
(4) 1 Q. B. D. 138.

charging the cargo according to the terms of the charterparty, and in the present action the charterer resorts to his remedy over against the merchant on the contract of sale. In both actions the facts are the same; the difference, if any, is that in the former suit the present plaintiffs were defendants. The fact that their position is reversed can make no difference with regard to their privilege. The present plaintiffs knew in the former action that they had become liable to the shipowner by the terms of the charterparty, and they would naturally lay before their solicitor the whole of the facts from beginning to end. To hold that such communications are not privileged would be contrary to common sense and justice.

MELLOR, J. I am entirely of the same opinion. It is plain that the papers which the defendants desire to inspect are the confidential communications between the plaintiffs and their solicitor, and no ground has been shewn for holding that these communications are not privileged. I am glad to find that our decision is in conformity with the practice in the Courts of Equity.

Order refused.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitor for defendants: *W. J. Foster.*

BISHOP OF ST. ALBANS AND OTHERS *v.* BATTERSBY.

May 21.

Covenant in Lease not to use the demised Premises as a Beershop or Public-house—Sale of Beer by Retail to be consumed off the Premises—Breach of Covenant.

A lease contained a covenant by the lessees not to permit any house that might have been erected on the land demised to be used as a beershop, or public-house, or any theatre, or public show, or exhibition.

The assignee of the lease carried on the business of a grocer and baker at a shop erected on the land demised. He obtained an Excise retail beer licence for the sale of beer to be consumed off the premises, and sold beer in pursuance thereof in his shop:—

Held, a breach of the covenant.

SPECIAL CASE, the facts of which were in substance as follows:—

By an indenture of lease, dated the 7th of May, 1868, the

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Reverend Brabazon Lowther and the Bishop of Rochester demised to the Haydock Collieries Industrial Co-operative Society a certain plot of land. By the said lease the lessees covenanted for themselves, their successors and assigns, amongst other things, that they would not carry on certain noisy or offensive businesses specified on the land, and should not nor would permit any house or building, to be erected in pursuance of the covenant in that behalf hereinbefore contained, to be appropriated for or converted into a place of public worship, without the special licence in writing of the lessors, and should not nor would permit any house or houses, which might have been erected on the premises, to be used as a beershop, or public-house, or any theatre, or public show, or exhibition.

The lease contained a proviso for re-entry for breach of covenant.

The plaintiffs were the assignees of the reversion in the lease, and the defendant was the assignee of the term.

Pursuant to one of the covenants in the lease certain buildings, consisting of a shop and warehouse, were erected after the date thereof on the land.

The defendant, who was a grocer and baker, carried on business in the shop and premises in partnership with his brother, Aaron Battersby. In September, 1876, Aaron Battersby obtained an Excise retail beer licence, for the sale of beer to be consumed off the premises. In October, 1877, Aaron Battersby obtained a renewal of such licence. The plaintiffs were no parties to the granting of such licences.

Aaron Battersby and the defendant, from the date of the granting of the said licence in September, 1876, down to the 12th of November, 1877, in addition to carrying on their ordinary business as grocers and bakers at the said shop and premises, had been in the habit of selling there, under and in pursuance of the beer licence, beer by retail to be drunk and consumed off the premises, and not to be drunk or consumed on the premises, and no part of the beer sold by them at the said house, shop, or premises had ever been drunk or consumed therein or thereon.

The plaintiffs brought their action for recovery of the premises as on a forfeiture for breach of the covenant above-mentioned.

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The question for the Court was, whether the sale of beer as aforesaid constituted a breach of the covenant and a cause of forfeiture.

W. G. Harrison, Q.C., for the plaintiffs. There was clearly a breach of the covenant, and consequently a forfeiture. A place where beer is sold by retail is a beershop.

J. Digby, for the defendant. The term "beershop" as used in the covenant means the same as a "beer-house," that is to say, a place where beer is sold to be drunk on the premises. The context shews that what was intended was to prevent the use of the premises for certain purposes tending to create noise and disorder. In *London and North Western Ry. Co.* v. *Garnett* (1) it was held that a covenant not to use premises as a beer-house was not broken by the sale of beer to be consumed off the premises. James, V.C., says in that case, "The question is, what was the meaning of the parties to the deed, and what was the ordinary meaning of the term 'beer-house' at the time when it was executed. Now, a person minded to ascertain the legal meaning of the word would naturally resort to Burns' Justice of the Peace, which was the book in constant use by magistrates who had to decide on granting or refusing licences. In the edition of 1845, current at that time, it was defined as "a house in which beer, &c., is sold by retail to be drunk or consumed on the premises." *Jones* v. *Bone* (2) is to the same effect. There the covenant was not to carry on the trade or calling of an hotel or tavern keeper, publican or beershop keeper, or seller by retail of wine, beer, spirits, or spirituous liquors, and it was held that the sale of wine and spirits in bottle by a person in the course of his trade was not such a breach of the above covenant as the Court would interfere with: see also *Pease* v. *Coats* (3).

[COCKBURN, C.J. There the words were, a "public-house for the sale of beer."]

Originally the licence was general for sale of beer to be consumed either on or off the premises. In the first instance, the licence for retailing beer under 11 Geo. 4 & 1 Wm. 4, c. 64, authorized the

(1) Law Rep. 9 Eq. 26. (2) Law Rep. 9 Eq. 674.
(3) Law Rep. 2 Eq. 688.

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sale of beer generally, and consequently for consumption off the premises and also on the premises.

The 4 & 5 Wm. 4, c. 85, recited that much evil had arisen from the conduct of such beer-houses, and provided that when the licence was for consumption on the premises, a certificate of good character should be required, and that the licence granted under the former Act without such certificate should not authorize the sale of beer to be consumed on the premises. The term "beer-house" or "beershop" is usually employed, however, in relation to places where beer is sold by retail to be consumed on the premises.

W. G. Harrison, Q.C., in reply.

COCKBURN, C.J. The contention for the defendant is, that the term "beershop" as used in the lease is synonymous with the term "beer-house." If at the time the lease was made there had been no such thing as a beershop, as distinguished from a "beer-house," I should have agreed with Mr. Digby. But at the time of the granting of the lease a state of things had arisen differing from that which had existed at one time, and what was once unknown had come into existence, viz., a house used exclusively for the sale of beer to be drunk off the premises. Such a house would be distinguishable from the "beer-house," and to it the term "beershop" is quite as applicable as to a beer-house. When we find that there is one class of premises capable of being thoroughly ascertained and distinguished by the term "beer-house," and that the term "beershop" is appropriate to another class of premises altogether, it follows that the two terms "beer-house" and "beer-shop" are not synonymous. The term "beershop" is large enough to embrace the particular establishment in question. A shop is a place where goods are sold. It most generally happens that they are not consumed where they are sold, and so the term is usually applied to places where goods are sold but not consumed. The result is that the terms used by the lease are large enough to cover this case. It is quite possible that the parties may not have intended to prevent such a sale of beer as this, but as they have used apt words to embrace it, we cannot cut down the natural effect of those words. We are not to make a contract for the

parties, but merely to interpret the terms they have used. Our judgment must therefore be for the plaintiffs.

MELLOR, J., concurred.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Lee & Brodie.*
Solicitors for defendant: *Maples, Teesdale, & Co.*

[IN THE COURT OF APPEAL.]

March 20.

WATT *v.* BARNETT AND OTHERS.

Practice—Substituted Service—Order IX., r. 2—Absence of Notice of Proceedings—Setting aside Judgment—Discretion.

The plaintiff, being unable to serve one of the defendants with the writ, obtained an order for substituted service against him under Order IX., Rule 2, and the action proceeded to judgment against all the defendants. The defendant against whom the order for substituted service had been made applied to be let in to defend, on the ground that he had a defence on the merits, and that he had never had any notice of the action while pending:—

Held, that as an order for substituted service had been properly made and service effected under it, the judgment was regular, and that the defendant could not, ex debito justitiæ, claim to be let in to defend the action; but that the Court, in the exercise of its discretion, could allow him to do so if it were shewn that he had no knowledge of the proceedings and had a defence on the merits; and that, as the giving leave was discretionary, the Court could impose terms.

THIS was an appeal by Barnett from an order of Cockburn, C.J., and Mellor, J. (1)

The action was against the defendants, who had been the directors of a limited company, to recover damages on the ground that they had, by false representations in a prospectus, induced the plaintiff, J. H. Watt, to take debentures in the company, which debentures had turned out worthless.

The writ was issued on the 1st of September, 1876, and the statement of claim was delivered on the 15th of January following. There were five defendants, of whom Barnett was the first named. Judgment was entered up in February, 1877, against one of the other four for default in pleading. The other three delivered

(1) 3 Q. B. D. 183.

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defences, on which issue was joined, but two only of them appeared at the trial.

At the time when the present action was commenced, a similar action of *Weir* v. *Barnett* was pending in the Exchequer Division against the same defendants, in which Messrs. Trinder & Co. acted as solicitors for Barnett. The plaintiffs applied to Trinder & Co. to accept service for Barnett in this action, but they declined to do so, or to give his address. He was at the time abroad, and had not for some time had any residence or office in England, and the plaintiffs could not discover his address. The plaintiffs, therefore, on the 28th of November, 1876, obtained from Master Hodgson an order for leave to effect substituted service, by sending a copy of the writ in a prepaid letter addressed to Barnett at the office of Trinder & Co. The affidavit on which this order was obtained did not state that Barnett was abroad. Copies of the writ and order were posted accordingly, and at the same time the plaintiffs' solicitors wrote to Trinder & Co., informing them of this having been done. Trinder & Co. returned the packet containing the copy writ and order, and a correspondence ensued in which they complained that the order had been obtained without stating that Barnett was resident abroad, and contended that it ought to be abandoned. The plaintiffs' solicitors ultimately acceded to this view, and informed Trinder & Co. that they should apply for a fresh order to the same effect. They made the application accordingly, on the ground that Trinder & Co. were acting as solicitors for Barnett in another action, knew his address, and refused to give it. An order for substituted service on Trinder & Co. was made accordingly on the 18th of December, under which the service was effected, and on the 20th of February, 1877, Barnett not having appeared, judgment for damages to be assessed was entered up against him.

The action was tried on the 19th of November, 1877, and one of the two defendants who appeared at the trial was Barnett's brother. The plaintiffs obtained a verdict upon which final judgment was entered up, and a considerable part of the damages was recovered from the defendants other than Barnett, leaving 500*l.* unpaid.

Barnett then applied before Field, J., at chambers, for leave

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to come in and defend, on the ground that the proceedings had not been brought to his knowledge until after the final judgment. This was supported by an affidavit by Trinder & Co., who stated most distinctly and precisely that, although they had been in communication with Barnett, they had never informed him of the pendency of this action, and, by the affidavit of the appellant himself, that he had never been informed of it.

Field, J., refused the application, and Barnett appealed.

The appeal was heard by Cockburn, C.J., and Mellor, J., who made an order letting in Barnett to defend, but only upon the terms of his giving security for the amount of the judgment that remained unsatisfied, and for costs (1). Barnett appealed.

Barnett had successfully defended a similar action of *Weir* v. *Barnett* (2), but it was deposed, and the affidavit was not contradicted, that whereas that action was for misrepresentations contained in a prospectus issued after Barnett went abroad, he was in the chair at the meeting of directors at which the prospectus on which the present action was founded was settled.

Wills, Q.C., and *Rolland*, for the appellant. It is ex debito justitiæ that a judgment should be set aside when the defendant has had no notice of the proceedings. The judgment therefore ought to be set aside unconditionally. The result of the similar action of *Weir* v. *Barnett* (2), shews that Barnett has substantial grounds of defence.

Reginald Brown, contrà. The principles on which substituted service is ordered are explained in *Hope* v. *Hope* (3). If the service was irregular, an application should be made to set it aside, where there is no such application you cannot go behind the order, or Order IX., Rule 2, would be rendered inoperative.

[JESSEL, M.R. There is no ground for setting aside the order for substituted service; the proceedings were perfectly regular; but still the Court has jurisdiction to let the defendant in to defend if he has not had notice of the proceedings.]

The two actions are quite different. *Weir* v. *Barnett* (2) was for misrepresentations contained in a prospectus issued after Barnett

(1) 3 Q. B. D. 183. (2) 3 Ex. D. 32.
(3) 19 Beav. 237; 4 De G. M. & G. 328.

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had left the country; the present action is for misrepresentations contained in a prospectus settled when he was in the chair.

Wills, Q.C., in reply.

JESSEL, M.R. The first question is what is the effect of Order IX., Rule 2. So far as the opinion of Mellor, J., in this case differed from that of Cockburn, C.J., I concur with Mellor, J. The object of the rule appears to me to be as stated by him. The Court, when an application for leave to effect substituted service is made, decides as to the propriety of granting it, and if service is effected according to the order of the Court it is, while the order remains undischarged, equivalent for all purposes to actual service. I agree, however, with both the learned judges that, though the service may have been regular according to the order, still the Court has power to set aside the judgment where that is necessary for the purpose of doing substantial justice. The mere fact that the defendant has not had notice of the proceedings is not of itself sufficient; to hold it to be so would in fact be setting aside the order for substituted service. But if he shews that he had no notice, and that he has a good ground of defence, it is reasonable that he should be let in to defend. The first question then is whether the Court is satisfied that there is a good defence on the merits, if not, leave to come in ought to be refused. I am not satisfied that there is any defence on the merits. This action was defended by persons who, as far as I can find from the affidavits, were in precisely the same position as Barnett. He urges that he was successful in another action of *Weir* v. *Barnett* (1), but it would appear that he was successful because the fraudulent representations complained of were contained in a document with which he was not personally connected. Here it is deposed that the proof of the prospectus complained of was settled at a meeting at which Barnett was chairman, and this statement has not been contradicted. On these materials I should not have been sufficiently convinced of his having a good ground of defence to induce me to allow him to defend. The Court below has taken a more favourable view and has allowed him to defend on giving security, which the plaintiff consents to reduce to the amount now remaining

(1) 3 Ex. D. 32.

due. The plaintiff not having applied for an alteration of the order we have nothing to do but to dismiss the appeal.

COTTON, L.J. The plaintiff does not ask us to vary the order but consents to reduce the amount of the security. The defendant contends that he has a right to be admitted to defend without having any terms imposed upon him. I think that he has not. I agree with the Master of the Rolls that substituted service duly effected must be regarded in the same light as personal service. We need not consider the question whether the order for substituted service when made could under the circumstances of this case have been discharged, but it appears to me that it was properly made. There are various grounds on which such an order may be made. Where a solicitor is acting for the party substituted service on him may properly be ordered, and so upon any other persons with whom the Court is satisfied that the party is in communication, and though Trinder & Co. did not in fact communicate the service, yet as they were acting for Barnett in a similar litigation the Court had a right to consider that the copy writ served would be sent on. I therefore see no reason for setting aside the service, nor for indirectly setting it aside, by letting in Barnett to defend, on the mere ground that the proceedings never came to his knowledge. Even where personal service has been effected, the Court has a discretion to allow a party who has not appeared to come in and defend, but it is a discretionary power, and I am not disposed to relieve Barnett from any condition which the Court below has thought fit to impose on him.

THESIGER, L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiff: *Linklater, Hackwood, Addison & Benn.*
Solicitor for defendant: *W. W. Wynne.*

1878.
May 16.

Ex parte RICHARDS.

Local Board of Health—Rescission of Resolution, Bye-law as to—Dismissal of Officer—Quo Warranto Information.

The Court refused to grant a rule for a quo warranto information applied for by the former occupant of an office, on the ground that his dismissal from office had been illegal, when they were satisfied that if reinstated he might legally and would be dismissed again immediately.

Semble, that a resolution of a local board, dismissing an officer, was not a resolution rescinding the resolution by which he was appointed, within the meaning of a bye-law with respect to the rescission of resolutions of the local board.

Rex v. *Trustees of Wrexham Turnpike Roads* (5 A. & E. 581) dissented from.

A RULE nisi had been obtained for a quo warranto against one Mr. Parry Jones, calling on him to shew by what authority he exercised the office of clerk to the local board of the district of Llangollen. The applicant for the rule was one Mr. Richards, who had been the clerk to the board previously.

The local board had been constituted under the Public Health Act, 1848 (11 & 12 Vict. c. 63), in 1857, the number of members of the board being nine. At the first meeting of the board, all the members being present, Mr. Richards had been appointed clerk by a unanimous resolution of the board. By 11 & 12 Vict. c. 63, s. 37, every officer or servant of the board was removable by the board at their pleasure. The Public Health Act, 1875 (38 & 39 Vict. c. 55), which consolidated the Acts relating to the public health, contains in s. 189 a similar provision.

By the 34th section of 11 & 12 Vict. c. 63, the local board are to make bye-laws with respect, among other things, to the transaction and management of business by such board under the Act. By the 1st schedule to 38 & 39 Vict. c. 55, the local board are to make regulations with respect to the same matters. The local board of Llangollen had made the following bye-law under the former Act: "No resolution of the local board shall be altered or rescinded unless one month's notice be given by the clerk to each member of the board setting forth the proposed alteration, nor unless there be at least as many members present at such meeting as were present at the meeting when such resolution was adopted; provided, &c."

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EX PARTE RICHARDS.

In September, 1877, at a meeting of the board, at which eight members were present, a resolution was passed, with only one dissentient, to the effect that Mr. Richards should cease to be the clerk of the board from the 31st of January, 1878.

The rule nisi was moved for and obtained on the grounds, 1st, that one month's notice to dismiss Mr. Richards was not given, and 2ndly, that at the meeting, whereby Mr. Richards was dismissed, there was not a number of members present equal to that present at the meeting whereby he was appointed, as required by the bye-laws.

McIntyre, Q.C. (with him *H. E. McIntyre*), shewed cause. A resolution dismissing an officer is not a resolution rescinding a previous resolution, within the meaning of the bye-law. It is obvious that the bye-law was never intended to apply to such a case as this, but to matters connected with the substantive business of the board with relation to the management of sanitary matters. The resolution to dismiss is an entirely fresh and distinct resolution. Secondly, quo warranto does not lie with regard to an office from which a man is removable at pleasure: *In re Fox* (1); *Darley* v. *Reg.* (2); *Rex* v. *St. Martin in the Fields.* (3)

F. Turner supported the rule. The case of *Rex* v. *Trustees of Wrexham Turnpike Roads* (4) is directly in point, to shew that the resolution to dismiss was a resolution rescinding a former resolution, within the meaning of the bye-law.

There is no authority to shew that a quo warranto will not lie merely because the party is removable at pleasure. The cases would rather seem to shew the contrary.

COCKBURN, C.J. I entertain a strong opinion that this bye-law has no application to the present case. When it is said that no resolution shall be altered or rescinded unless a month's notice is given, and it is rescinded by a meeting consisting of a certain number of members, I think the provision must be intended to apply to some subsisting rule or order of the board as to some of

(1) 8 E. & B. 939; 27 L. J. (Q.B.) 151.
(2) 12 Cl. & F. 520.
(3) 17 Q. B. 149; 20 L. J. (Q.B.) 423.
(4) 5 A. & E. 581.

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EX PARTE RICHARDS.

the substantive matters within their jurisdiction. It cannot be meant that a resolution to appoint a man to an office is altered or rescinded within the meaning of these words by his dismissal from office. The resolution to dismiss is a fresh and independent resolution, not a rescission of the former resolution. If this case had arisen under the Turnpike Acts we might have been bound by the decision cited by Mr. Turner; but I must own the decision appears to me a very questionable one, and one that I should not feel bound to follow except under precisely similar circumstances.

Moreover, the application for a quo warranto here appears to be a mere abuse of the process of the Court. The local board have resolved, whether rightly or wrongly, to dismiss this gentleman, and it lies entirely within their pleasure to do so or not. In such a case what would be the good of a quo warranto? If the gentleman at present holding the office was turned out and the applicant replaced, he might immediately be dismissed again. Under these circumstances the application is only vexatious, and the granting of it could in no respect be beneficial to the applicant. The application must, therefore be refused.

MELLOR, J. I am of the same opinion. It is a question whether the bye-law applies at all to the dismissal of persons holding office at pleasure. But, however this may be, and whether the proceedings were regular or not, the applicant was dismissed. If we are satisfied that the only effect of granting this application would be to interpose some further trouble, but the result would be that the applicant would be dismissed all the same, it would be idle to grant the application.

Rule discharged.

Solicitors for applicant: *Simpson, Hammond, Simpson, & Richards.*

Solicitors for Mr. Jones: *Dean & Taylor.*

COHEN *v.* HALE.

THE MIDLAND RAILWAY COMPANY, GARNISHEES.

1878
May 23.

Attachment of Debt—Garnishee Order—Debt for which Cheque given—Stoppage of Cheque—Order XLV.

A garnishee order was made under Order XLV., Rule 2, attaching a debt. At the time the order was made the garnishees had given the judgment debtor a cheque for the amount of the debt. Upon service of the order on the garnishees they stopped payment of the cheque at the bank, the cheque not having been presented:—

Held, that upon the cheque being stopped it was as if it had never been given, and that there was therefore an existing debt capable of being attached, and the garnishee order was effectual.

MOTION to set aside an order of the district registrar of Dudley. The facts were as follows:

The plaintiff recovered judgment in the action on the 9th of November, 1877, for 35*l.* 12*s.* On the 24th of December the Midland Railway Company, being indebted to the defendant in the sum of 44*l.* 8*s.* 9*d.*, drew a cheque for that amount on the Wolverhampton Branch of Lloyd's Banking Company, and sent it to the defendant, who received it a day or two afterwards. On the 27th of December the plaintiff applied for and obtained a garnishee order under Order XLV., Rule 2, attaching the debt due from the Midland Railway Company to the defendant. This order was served on the Midland Railway Company on the 30th of December, and they thereupon stopped payment of the cheque, which still remained in the hands of the defendant unpresented. The defendant retained the cheque till the 11th of February, and then took it to the Dudley Branch of Lloyd's Banking Company, and got them to give him cash for it, that branch not being the one on which the cheque was drawn, and knowing nothing of the stoppage of the cheque. The Midland Railway Company suggested that Lloyd's Banking Company had a lien or charge on the debt, and Lloyd's Banking Company ultimately appeared on the garnishee proceedings and claimed to have such lien or charge, but the district registrar made an order barring any lien or charge on the debt attached as between them and the garnishees, but not as between them and the judgment debtor, and directing that the

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judgment creditor should recover the sum of 35*l.* 12*s.*, and that execution should issue against the garnishees for that amount.

R. C. E. Plumptre, moved, on behalf both of the garnishees and Lloyd's Banking Company, to rescind the above-mentioned order. There cannot be an attachment of anything but an absolute debt. When the cheque was given there was no longer an absolute debt. Payment of a debt by cheque is a conditional payment, and operates as a payment until the cheque is dishonoured: Chitty on Bills, 11th Ed., p. 356. A creditor who takes a cheque takes what is equivalent to a cash payment if the cheque is ultimately paid. If the cheque is dishonoured the debt revives. At the time the garnishee order in the present case was served there was no absolute debt, for the cheque was then in the hands of the judgment debtor unpresented. If the debt could be attached under these circumstances, it would follow that the execution creditor could call on any garnishee who had given a cheque to go and stop it immediately, and hold him responsible if he did not.

[COCKBURN, C.J. It may be that the garnishees could have refused to stop the cheque, but they did stop it; under these circumstances is not the payment gone ab initio?]

The garnishee order must be good or bad when made, and when it was made there had been a conditional payment of the debt, and it was uncertain whether the debt ever would revive: *Hall* v. *Pritchett*. (1)

The garnishees had no right to stop the cheque. The stopping of the cheque was wrongful as against the execution debtor.

[COCKBURN, C.J. The only effect of it would be to remit him to his original right on the consideration for the cheque.]

[He also cited *Keene* v. *Beard*. (2)]

E. Clarke, for the judgment creditor, was not called upon to shew cause.

COCKBURN, C.J. This is a clear case. It appears to me that the reasoning of the counsel for the garnishees involves a fallacy. It treats the debt as extinguished when the garnishee order was served. It is contended that there must be a subsisting debt on

(1) 3 Q. B. D. 215. (2) 8 C. B. (N.S.) 372; 29 L. J. (C.P.) 287.

6 Jur. N.S. 1248

which the order can operate when it is served. But granting this, the reasoning fails, because it is not, in my opinion shewn that there was not, as the event happened, an existing debt in this case. It is very true that a man who takes a cheque may be estopped from proceeding to enforce payment of the debt until presentment of the cheque, and if the cheque is ultimately paid the debt is extinguished. All that happens in the meantime is that the right of action is suspended. But when the cheque is presented and dishonoured, the debt, the remedy for which was suspended until presentment of the cheque, may be treated as a debt subsisting all along, just as if the cheque had never been given. The giving of the cheque only suspends the remedy, it does not extinguish the debt. Therefore when the Midland Railway Company stopped this cheque it was, in my opinion, as if it had never been given. It may be that the garnishee order could not have been made effectual against them if they had declined to stop the cheque, on the ground that having given it they had so far pledged themselves that it would not be proper for them to stop payment of it, but they did not take this course, and by their direction the cheque was stopped. The suspension of the remedy then ceased, and the debt remained just as if the cheque had never been given. Under these circumstances I think the garnishee order could be enforced against the Midland Railway Company.

MELLOR, J. I am of the same opinion. The fallacy of the garnishees' contention in my opinion is, that it does not sufficiently distinguish between the mere suspension of the remedy and the extinguishment of the debt. Till the cheque is presented the remedy is in suspense, but the debt itself is not affected. The debt has never been paid, and remains in the event, I think, the proper subject of a garnishee order, though the remedy was suspended till a date subsequent to the service of the order.

Order refused.

Solicitor for judgment creditor: *Cole, for Lowe.*

Solicitors for garnishees and Lloyd's Banking Company: *Emmett, for Saunders, Smith, & Parish.*

1878
[May 30.

EX PARTE SMITH.

Licensing Acts (32 & 33 *Vict. c.* 27), *s.* 8; (35 & 36 *Vict. c.* 94), *s.* 69—*Licences to retail Beer, Wine, and Spirits not to be consumed on the Premises—Justices bound to state Ground of refusal—Mandamus to hear and determine.*

By the provisions of the statutes relating to licensing, certain licences for the sale of intoxicating drinks not to be consumed on the premises are not to be refused, except on one or more of four grounds specified. Justices on refusing to grant such a licence did not state any ground for such refusal. They were not, however, asked to state their ground for such refusal; and on an application for a mandamus against them to hear and determine the application for the licence, the chairman of the justices made an affidavit that they had in fact acted on one of the grounds on which they were empowered to refuse the licence:—

Held, on the authority of *Reg.* v. *Sykes* (1 Q. B. D. 52), that the justices were bound to state their grounds at the time of refusing the application, and the mandamus therefore went.

RULE calling upon certain justices of Surrey to shew cause why a mandamus should not issue commanding them to hold an adjourned licensing meeting, and to hear and determine the application of one William Julian Smith for licences to sell beer, wines, and spirits by retail not to be consumed on his premises.

The 69th section of 35 & 36 Vict. c. 94, provides that "a licence for the sale of liqueurs and spirits by retail not to be consumed on the premises may, where such licence is required by this Act, be granted in the same manner in all respects in which a licence for selling wine not to be consumed on the premises may by law be granted, and an application for such licence shall not be refused, except upon one or more of the grounds on which a certificate in respect of a licence to sell by retail beer, cider, or wine not to be consumed on the premises may be refused." By 32 & 33 Vict. c. 27, s. 8, "No application for a certificate under this Act in respect of a licence to sell by retail beer, cider, or wine not to be consumed on the premises shall be refused, except on one or more of the following grounds, viz., 1. That the applicant has failed to produce satisfactory evidence of good character, &c., &c."

It appeared from the affidavit of the applicant that the justices had refused the licence without specifying any grounds for such refusal. They were not, however, asked to specify their grounds.

In the affidavit made by the chairman of the justices in answer to the rule he stated that, though the justices had not expressed any grounds for refusing the licence, they had in fact refused to grant the licence because the only evidence as to character that the applicant brought forward was that of his own landlord, whom the justices considered to be so biassed in favour of the application that his testimony could not be relied on as satisfactory evidence of good character.

F. Turner shewed cause. This case is distinguishable from *Reg.* v. *Sykes.* (1) There the justices refused to state their grounds at the hearing, though they were asked to do so, and persisted in such refusal, inasmuch as they did not in their affidavit state their grounds. Here the justices were not asked to state their grounds at the hearing, and they now state a valid ground of refusal.

Anderson, in support of the rule, contended that the case was governed by *Reg.* v. *Sykes.* (1)

THE COURT (Cockburn, C.J., and Mellor, J.) were of opinion that the case was within the authority of *Reg.* v. *Sykes.* (1) They therefore made the rule absolute.

Rule absolute.

Solicitors for applicant: *Stokes, Saunders, & Stokes.*
Solicitor for justices: *Jenkins.*

(1) 1 Q. B. D. 52.

[1878
May 21.

COVERDALE *v.* CHARLTON.

Local Board—"Street"—Highway, Soil of—Letting Pasturage by the Side of the Road—38 & 39 Vict. c. 55, ss. 4, 144, 149—"Vest," Meaning of.

14 Ch D 795
799

The local board of a district had let the pasturage of the strips of grass which formed the sides of a certain lane within such district, being a highway repairable by the inhabitants at large, to the plaintiff.

The defendant, without any right to do so, turned his cattle on to these strips of land to graze. The plaintiff having brought an action against the defendant for so doing, the latter denied the plaintiff's right to the pasturage:—

Held, that the lane in question, being by virtue of s. 4 (the interpretation section) of the Public Health Act, 1875, a "street," vested in the local board under the provisions of s. 149; and that the "vesting,' intended by that section was not merely of the use and control of the lane so far as might be necessary for highway purposes, but an actual vesting of the property in the lane, and consequently that the lease from the local board entitled the plaintiff to maintain the action.

Affirmed 4 QBD 104

SPECIAL CASE stated in an action brought to try the right of the plaintiff as against the defendant to the herbage or pasturage in and about the sides of a certain road in Cottingham, a parish or township in the East Riding of Yorkshire, and to recover damages from the defendant for the infringement of such right, and for trespass to the said herbage or pasturage.

The facts were, so far as material to this report, in substance as follows:—

The road in question was called Endyke Lane, and was set out as a private road under an Inclosure Act passed in 1766. Since the year 1818 Endyke Lane had been a public road, and as such had been repaired by the parish. It appeared that down to 1863 the surveyors of highways, and from 1863 to the commencement of the action, the local board for the district of Cottingham, to whom the office of surveyor of highways was then transferred, had in every year agreed with various persons for the letting to them of certain rights of herbage or pasturage on the side of the road.

On the 19th of April, 1876, the local board, by agreement in writing, let to the plaintiff the herbage or pasturage for cattle, except sheep, in and about the sides of Endyke Lane until the 23rd of November then next for a certain sum.

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The day after the execution of the agreement the plaintiff commenced depasturing the herbage with his cattle in the said road, and thenceforth to the time of action brought regularly continued to do so. The defendant on the 25th of April, 1876, turned cattle into Endyke Lane to graze.

It was agreed that if the judgment of the Court were for the plaintiff the amount of damages was to be 1*s*. The question for the Court was whether the plaintiff was entitled to recover.

Wills, Q.C. (*Wilberforce* with him) for the plaintiff. Endyke Lane was a street within the meaning of the Public Health Act, 1875, s. 149, which enacts that all streets, being highways repairable by the inhabitants at large, within any urban district, and the pavements, stones, and other materials thereof, and all buildings implements and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority. By s. 4 the term "street" includes any highway not being a turnpike-road, and any road, lane, &c. By s. 144 the local board are to execute the office of surveyor of highways.

Dodd, for the defendant. The term "vest," as used in the statute, does not mean that the fee simple in the soil is vested in the local board. It merely means that the use and management of the highway is to devolve on the local board, and that for all purposes incidental to the highway they are to have the use of and control over the soil. The local board cannot, as such, have any right to let the grazing by the side of the highways. They are a statutory corporation existing for certain express statutory purposes, and must use this property for such purposes. They are not entitled to exercise the general rights of an owner of property over the soil of the highways.

[COCKBURN, C.J. It is not proved that the right of pasturage in any way interferes with the highway purposes.]

Wills, Q.C., in reply.

COCKBURN, C.J. It is certainly rather startling to find that under the term "urban district" may be included an area of a thoroughly rural character, such as this appears to be, and that under the term "street" a green lane may be included. But it

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COVERDALE v. CHARLTON.

appears to have pleased the legislature so to enact. Looking to the terms of the 149th section, read by the light of the 4th section of the Act, I can only come to the conclusion that this lane was a highway vested in the local board. The question then arises, in what sense the term "vest" is used. It is suggested by the defendant that it is not meant that the ownership of the soil shall vest, but simply such rights over the surface as are necessarily incidental to the use of the highway. This appears to me too narrow a construction. It is clear that the whole of these strips of land are so completely under the control of the local board that they might at any moment convert them into metalled road. It may be that it is a great hardship on the person in whom the soil of the highway was vested before the local board was formed, that the soil should be divested out of him by the statute and vested in the local board, but if the legislature has chosen so to enact, they are omnipotent. The soil of the road being vested in the local board, it follows that they have a right in law to dispose of it, and to let the herbage to the plaintiff as they have done. The plaintiff therefore, in our opinion, is entitled to maintain this action for the interference by the defendant with his right.

MELLOR, J. I am of the same opinion. The defendant's counsel failed, I think, to shew that the Act uses the word "vested" in the limited sense he suggests. He argued that the roads vested in the local board only for certain limited purposes connected with the use and management of the highway. But the language seems to me to go further, and to vest the property in the soil in the local board. If so, it follows that they could confer on the plaintiff such an exclusive right as would entitle him to maintain this action against a person who, like the defendant, sets up no superior title in himself, provided that they did not interfere with the purposes of the highway.

The judgment must, therefore, be for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *Stirke, for J. Seymour Moss.*
Solicitors for defendant: *Morris, for Spears.*

THE QUEEN *v.* SANKEY AND OTHERS. 1878

March 7.

Elementary Education Acts, 1870 *and* 1873 (33 *&* 34 *Vict. c.* 75), *ss.* 74, 84, 90, *Second Schedule, Second Part* (36 *&* 37 *Vict. c.* 86), *Second Schedule—Personation—Passing of Resolution for application for School Board—Bye-law creating Offence.*

The Elementary Education Acts, 33 & 34 Vict. c. 75, s. 90, and 36 & 37 Vict. c. 86, second schedule, which impose a penalty for the offence of personating any one entitled to vote at the election of a school board, do not include the offence of personation at the voting for a resolution for application for a school board; and an Order in Council purporting to be made under the above Acts, and imposing a penalty upon any one guilty of such offence, is invalid.

RULE calling on three justices for the county of Flint to shew cause why a writ of certiorari should not issue to remove, for the purpose of quashing it, a conviction by them on the 15th of December, 1877, whereby they convicted George Metcalf the younger for personating and falsely assuming to vote in the name of George Metcalf the elder, at the voting for passing a resolution for application for a school board for the parish of Whitford, Flint—on the grounds (amongst others) that there was no enactment constituting the offence charged, and if there were, the information was not founded upon nor laid under it.

It appeared from the affidavits that an information having been preferred against George Metcalf the younger, charging him with having, on the 15th of December, 1877, at the voting for passing a resolution for application for a school board for the parish of Whitford, knowingly personated and falsely assumed to vote in the name of George Metcalf the elder, a person entitled to vote at such election, he was convicted in the penalty of 40*s.* and costs.

Gorst, Q.C., shewed cause. The conviction was clearly warranted by the Order in Council made under the Elementary Education Act, 1873, 36 & 37 Vict. c. 86 (1), assuming that this Order in

(1) By the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), second schedule, first part. Rules respecting election and retirement of members of a school board. (1.) The election of a school board shall be held at such time, and in such manner, and in accordance with such regulations as the Education Department may from time to time by order prescribe."

By s. 84: "After the expiration of three months from the date of any

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Council was valid. Upon reference to the different sections of the Elementary Education Acts, 1871 and 1873, it is evident that a meeting of ratepayers for the purpose of passing a resolution to

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order or requisition of the Education Department under this Act, such order or requisition shall be presumed to have been duly made and to be within the powers of this Act; and no objection to the legality thereof shall be entertained in any legal proceeding whatever."

Sect. 90. "If any person knowingly personate and falsely assume to vote in the name of any person entitled to vote in any election under this Act, or forge or in any way falsify any name or writing in any paper purporting to contain the vote or votes of any person voting in such election, or by any contrivance attempt to obstruct or prevent the purposes of any such election, or wilfully contravene any regulation made by the Education Department under the second schedule to this Act with respect to the election, the contravention of which is expressed to involve a penalty, the person so offending shall, upon summary conviction, be liable to a penalty of not more than fifty pounds, and in default of payment thereof to be imprisoned for a term not exceeding six months."

By the second schedule, second part, Rules respecting resolutions for application for school board. "(1.) The meeting of a council for the purpose of passing such a resolution shall be summoned in the manner in which a meeting of the council is ordinarily summoned, and the resolution shall be passed by a majority of the members present and voting on the question.

"(2.) The resolution passed by the persons who would elect the school board shall be passed in like manner, as near as may be, as that in which a member of the school board is elected, with such necessary modifications as may be contained in any order made under the powers of the first part of this schedule; and such powers shall extend to the passing of the resolution in like manner as if it were an election, but the expenses incurred with reference to such a resolution shall be paid by the overseers out of the poor-rate."

By the Elementary Education Act, 1873 (36 & 37 Vict. c. 86), s. 6, the principal Act (33 & 34 Vict. c. 75) shall be construed as if there were substituted for the rules numbered 1 and 3 in the first part of the second schedule to the principal Act the rules in the second schedule to this Act.

By the second schedule—Rules respecting the election of members of a school board. "(1.) The election of a school board shall be held at such time and in such manner, and in accordance with such regulations as the Education Department may from time to time by order prescribe . . . .: Provided,

"(*b.*) Any poll shall, so far as circumstances admit, be conducted in like manner in which the poll at a contested municipal election is directed by the Ballot Act, 1872, to be conducted, and subject to any exceptions or modifications contained in any order of the Education Department made in pursuance of this Act, the Ballot Act, 1872, shall apply in the case of the election of a school board in like manner as if the provisions thereof were hereinenacted with the substitution of 'school board election' for 'municipal election.'" And 33 & 34 Vict. c. 75, s. 90 (so far as it relates to personation) is repealed.

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apply for a school board, is to proceed in the same manner as voters at the election of members, subject to such modifications as may be introduced by regulations prescribed by the Education Department. Here the regulation has affixed a penalty to the offence of personation at such a meeting, which was therefore duly imposed. The order, even if otherwise invalid, is made valid by s. 84 of the Elementary Education Act, 1870.

Fullarton, in support of the rule. The Acts themselves impose no penalty for the offence of personation at a meeting to pass a resolution to apply for a school board. With regard to the regulation creating the offence and imposing the penalty, it is ultrà vires. It may be admitted that if the Act had created the offence of personation at a meeting like that in question, the regulation might have imposed a penalty for such offence: *Hall* v. *Nixon*. (1) But there is no power in the second schedule of the Elementary Education Act, 1870, to make regulations which shall have the effect of extending the penalties incurred at the election of members of a school board to the proceedings at a meeting to pass a resolution for a school board. It gives powers to modify procedure, not to create new offences. Sect. 84 only validates orders otherwise good, but bad for some informality, not orders wholly ultrà vires in their substance and therefore not "under this Act."

MELLOR, J. I think this conviction must be quashed, on the ground that the defendant was convicted of an offence which under the circumstances could not be created. It has been contended that the Board of Education are able to deal with the mode

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By Order in Council under the above Act, dated the 3rd of October, 1873, regulations were issued, headed "The general regulations as to passing resolutions for application for school boards in parishes not situate within municipal boroughs or within the metropolis." By paragraph 13 [*e*] of these regulations the provisions of ss. 3, 4, 11, and 24 of the Ballot Act, 1872, shall be deemed to be regulations contained in this order, which involve a penalty within the meaning of s. 90, of the Elementary Education Act, 1870.

The Ballot Act, 1872, 35 & 36 Vict. c. 33, s. 24, above referred to, enacts (with respect to parliamentary and municipal elections) that the offence of personation shall be a felony, and any person convicted thereof shall be punished by imprisonment for a term not exceeding two years, together with hard labour.

(1) Law Rep. 10 Q. B. 152.

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in which the preliminary resolution or preliminary application for a school board shall be determined, upon the same principles as though it had been the question of the actual election of a school board. Now I think that is not so, and that this is an offence for which this man was not liable to be imprisoned, for we cannot extend the words to anything beyond this, that the Board of Education are to have the power to regulate the mode, the time, and the circumstances and the conditions under which the preliminary application for a school board shall be held. They have no power to go further, and the words to which Mr. Gorst has referred appears to me to be entirely satisfied by this view of the case. We should be proceeding against all the recognised principles of construction, if, without express authority, we were to extend the powers of the School Board Commissioners, so as to enable them to make personation an offence without a direct statutory authority so to do.

The rule must be made absolute, and the man discharged from the consequences of his conviction.

LUSH, J. I also am of opinion that the Order in Council in this respect is ultrà vires, and also that it is not cured or made valid by the operation of the 84th section.

The first Education Act says that the persons who vote on a resolution for a school board shall be the same persons and constituted in the same manner, or, at all events by the same persons who would elect the members of the school board if they were eligible. The same statute makes it a penal offence for anyone wilfully to personate another when he votes at an election, but it does not make it an offence to vote at the preliminary resolutions at all. Therefore, for some reason or other, the legislature have confined the penal consequences to the act of voting at an election, and merely contented themselves with saying that those who vote at the preliminary resolution shall be the persons who shall vote or have the power to vote at the election. That is all. The schedule of the first Act in the second part is headed "Rules respecting resolutions for applications for school board," and that second clause is the one relied on by Mr. Gorst, as giving by implication the power to the Education Board to extend the penal consequences to a person

who personates another at the preliminary meeting. But this is what the statute has not done. The words are these, "The resolution passed by the persons who would elect the school board shall be passed in like manner, as near as may be, as that in which the school board is elected, with such necessary modifications as may be contained in any order made under the powers of the first part of the schedule." The first part of the schedule speaks entirely of rules respecting the election and retirement of members of school boards. Then it goes on with words, the precise meaning of which I am not able to see at present, in connection with other parts of the Act, and says, "Such powers shall extend to the passing of the resolution in like manner as if it were an election." Now, Mr. Gorst argues that those words have no meaning, unless they can be construed to extend the power of inflicting the same penalty, or some other penalty for personation at the preliminary meeting, as the statute has inflicted for personation at an election. But whatever they may mean, I certainly cannot think we are justified in holding upon any principle of construction that such words convey by implication or give a legislative power to create an offence which the statutes have refrained from doing. They may have no meaning at all for aught I know, but certainly, we cannot construe words of an ambiguous meaning as conveying a power to create a new offence.

Then the subsequent Act repeals that earlier part of the 90th section, which makes it an offence falsely to personate another at an election and substitutes for it the provision of the Ballot Act, which contains an enactment relating to personation and makes it a felony; but that also is in the schedule of rules respecting the election of members of school boards. The new enactment did not intend to carry the matter any farther than the first Act, and therefore I am of opinion that so far as there is any authority, express or implied, in the Act, the Order in Council, which says that any person who personates another at the meeting for this preliminary resolution shall be liable to a penalty and imprisonment, is invalid. Then is it made valid by the 84th section, which says, "After the expiration of three months from the date of any order or requisition of the Education Department under this Act such order or requisition shall be presumed to have

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THE QUEEN v. SANKEY.

been duly made and to be within the powers of this Act, and no objection to the legality thereof shall be entertained in any legal proceeding whatever."

Now I think that this section only applies to orders which may be irregular to a given extent; but I cannot think it was meant to validate an order which really amounts to a legislative enactment creating a new offence, if it should have been in operation for three months and no opportunity had arisen for testing its validity. I cannot hold that this is the meaning of that 84th section, where it is apparent as it must be taken to be that this is really a legislative provision without any authority given by the Act. It cannot be that this is a matter which was ever intended to be cured simply from the fact of the order having been made three months and no objection taken to it.

Rule absolute.

Solicitor for prosecution: *W. W. Wynne, for Cartwright, Chester.*
Solicitors for defendants: *Solicitors for the Treasury.*

May 11.

BRADLEY, APPELLANT; THE BOARD OF WORKS FOR THE GREENWICH DISTRICT, RESPONDENTS.

Metropolitan Local Management Act (25 & 26 *Vict. c.* 102), *s.* 53—*Construction of New Sewer—Limitation of Time for making Apportionment.*

The Metropolis Management Amendment Act (25 & 26 Vict. c. 102), s. 53, enacts that, "where any sewer shall be constructed by any vestry or district board in a street in which previously to such construction there had been no sewer, &c., but where sewers rates have been levied previously to such construction, the expense of constructing such sewer and the works appertaining thereto shall be borne in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively, and the amount to be borne by such owners shall be determined by the vestry or district board in each particular case, and the residue of such expenses shall be defrayed out of the sewers rate," but there is no limitation of the time within which the amount payable by the owners of such land and houses is to be apportioned.

Where therefore a sewer had been constructed within the meaning of the section in 1868, and no apportionment of the amount of the cost of constructing it, to be borne by the owners of the houses in the street, was made until 1876:—

Held, that the apportionment was valid.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

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1. On the 28th of March, 1878, the appellant was summoned upon a complaint charging that on the 21st of March, 1878, he neglected and refused to pay 18*l.* 18*s.* 5*d.*, being the amount charged upon and to be contributed by him as owner of a house and premises forming, and certain lands bounding or abutting on, a street called St. John's Park, in the parish of Greenwich, Kent, being a proportion of the expense of constructing a sewer for the drainage of the street and the works appertaining thereto, and other incidental charges and expenses; and upon the hearing on the 3rd of April, 1878, the magistrate made an order upon him for the payment of the sum of 18*l.* 18*s.* 5*d.* in the terms of the summons.

In 1868 the board constructed a sewer in and for the drainage of St. John's Park, in the parish of Greenwich, Kent, and within the district of the board, and within the Metropolitan Police district, St. John's Park being a new street within the meaning of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120) and the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. 102), ss. 52 and 53 (1), and in which new street there had been no sewer previously to the construction of the said sewer, and in which sewers rates had been levied between the 1st of January, 1863, and the 31st of December, 1869.

The sewer was constructed under a contract for the construction of sewers in ninety-nine streets within the district of the board, some of such streets being old streets and some new streets within

(1) By the Metropolis Management Amendment Act (25 & 26 Vict. c. 102), s. 53—"Where any sewer shall be constructed by any vestry or district board in a street in which previously to such construction there had been no sewer, &c., but where sewers rates have been levied previously to such construction, the expense of constructing such sewer and the works appertaining thereto—shall be borne in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively, and the amount to be borne by such owners shall be determined by the vestry or district board in each particular case, and the residue of such expenses shall be defrayed—out of the sewers rate—and the amount so charged by the vestry or district board upon or in respect of such house or premises shall be payable either before the works shall be commenced, during their progress, or after their completion, as the vestry or board shall in each case determine, either in one sum or by instalments, within such period not exceeding twenty years, as the vestry or board shall direct."

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the meaning of the Acts, and completed on or about the 1st December, 1868.

On the 14th of January, 1866, and before the making of the contract, and with reference to the sewers therein mentioned, the board, by resolution duly passed, resolved that, in order to carry into effect the provisions of the Metropolis Management Act, 1862, with regard to the expenses of constructing sewers in new streets where there had been previously no sewer or only an open sewer, a person should be appointed with directions to lay before the board a correct statement of all streets formed or laid out since the 7th of August, 1862, as mentioned or referred to in the committee's report in such resolution mentioned, so that the Board might determine upon the proper charges to be made under the the authority of the statute. The last-named committee's report recommends that some person or persons be appointed with directions to lay before the board a correct statement of all streets, or parts of streets, formed or laid out since the 7th of August, 1862, or of which the maintenance of the paving and roadway had not previously to that date been taken into charge and assumed by the parochial authorities or by the district board.

On the 1st day of December, 1869, at a special meeting of the board, resolutions were passed—that in the several streets in the district in which sewers have been constructed by the board, but in which sewers rates have been levied between the 1st of January, 1851, and 31st of December, 1855, the owners of land and houses therein be charged 30 per cent. of the cost of such sewers and all incidental expenses attending the same; between the 1st of January, 1856, and the 31st of December, 1858, 40 per cent., between the 1st of January, 1859, and 31st of December, 1862, 60 per cent., and between the 1st of January, 1863 and 1869, 90 per cent., together with all incidental expenses as aforesaid in each case, and that twelve calendar months be allowed to owners for payment of the charges and expenses to be so borne by them respectively under the provisions of the statute, and that such payments be made by three equal instalments, that is to say, one third within four calendar months of the date of the board's order, one other third at the end of the next succeeding four calendar months, and the remaining one third at the end of twelve calendar months from the same date.

In pursuance of these resolutions the board from time to time during and since the year 1869, and on and prior to the 14th of June, 1876, made various apportionments of the cost of certain of the sewerage works mentioned in the contract amongst the persons liable to contribute to such cost under 25 & 26 Vict. c. 102, ss. 52, 53. The works mentioned in the contract were in the first instance paid for out of moneys raised upon the credit of the sewer rates of the parish of Greenwich, repayable by instalments with interest, and all moneys which have been received by the board under such apportionments have been applied so far as they would go by the board in payment of the instalments and interest, and the remainder of each instalment and interest has been made up out of the mortgaged rates.

No apportionment in respect of the sewer in St. John's Park was made until the 14th of June, 1876, when the board apportioned 90 per cent. of the cost of constructing the sewer in such street amongst the owners of the houses in the street, and of the land bounding and abutting thereon, and on the same day the board made an order for the payment of the amount apportioned, and the amount so charged to the appellant was £18 18*s.* 5*d.*

The appellant was at the time of the construction of the sewer and of making the apportionment, and now is, the owner of a house in, and of land bounding and abutting on, the street called St. John's Park.

The appellant contends, 1. That the apportionment of the 14th day of June, 1876, is bad, inasmuch as it was not made in accordance with the provisions of 25 & 26 Vict. c. 102, and that the owners of houses and lands bounding and abutting on the street called St. John's Park cannot now be charged with the cost of the construction of the sewer or any part thereof; 2. That the cost of and incidental to the construction of the sewer must be defrayed and borne by the Greenwich District Board of Works, and paid for out of the sewer rates.

The question for the opinion of the Court is, whether the apportionment of the 14th of June is a valid apportionment.

J. Brown, Q.C. (*Biron*, with him), for the appellant. The Act 25 & 26 Vict. c. 102, s. 53, does not in express terms limit the

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time within which the contribution payable under s. 53 is to be ascertained. But having regard to the general tendency of the Act and to the public convenience, it must be taken that the apportionment is to be made during the construction of the sewer, or within a reasonable time afterwards. If a different construction be adopted, the board may be guilty of inexcusable delay, for which no remedy can be suggested.

Philbrick, Q.C. (*Petheram*, with him), for the respondents. No limit as to the time for making the apportionment can be found, and s. 52, enabling the board to distribute the amount chargeable on landowners under the Act over a term of years, shews that no limit was ever contemplated.

J. Brown, Q.C., in reply.

COCKBURN, C.J. I think this appeal wholly fails, and that our judgment must be for the respondents. There can be no doubt that the street in question came within the provisions of the Metropolis Management Act, 1862, s. 53, and that it was within the power of the district board to construct the sewer in the way they did. The only question we have to consider is whether the apportionment of the amount payable by the appellant was made within proper time. Now, turning to s. 53, we seek in vain for any limitation of the time within which the apportionment is to be completed. And as the legislature have fixed no limit it is impossible for us to introduce one. As to the objection that the board might be guilty of undue delay, I think this might be remedied by a mandamus calling upon them to exercise the powers of the Act. It was probably supposed that a representative body like the board could be trusted to act fairly in the interest of the ratepayers, and that it was unnecessary to restrict them in point of time. But at all events we cannot amend the Act by inserting in it a provision which we do not find there.

MANISTY, J. I am of the same opinion. Sect. 53 gives power to the board to construct the sewer, and apportion the cost of making it, but no time is limited within which this apportionment is to be made. It may be that the legislature thought that a representative body ought to be trusted to do it within a reason-

able time. I can myself believe that there may be cases in which there might be a good reason for delay in making the apportionment. But in any case I am sure that if there is a question whether the apportionment was or was not made within a reasonable time, we are not the proper persons to decide it.

Judgment for the respondents.

Solicitors for appellant: *Hughes, Hooker, & Buttanshaw.*
Solicitor for respondents: *Spencer.*

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Feb. 22: *May* 13.

Damages, Recovery of prospective—Support from adjacent Land, Right to.

In an action for injury to the plaintiff's land and buildings, by removal of lateral support through mining operations carried on by the defendant on his own land adjoining, it was found by a referee to whom the amount of damage was referred that, in addition to existing damage, there would be future damage to the extent of 150*l.*:—

Held, by Mellor and Manisty, JJ. (Cockburn, C.J., dissenting), that such damage was recoverable in the action:

By Cockburn, C.J.: Inasmuch as, according to *Backhouse* v. *Bonomi* (9 H. L. C. 503), the damage was the gist of the action, only the damage actually accrued could be recovered in the action, and any further damage must be recovered when it actually occurred in a subsequent action.

Nicklin v. *Williams* (10 Ex. 259) and *Backhouse* v. *Bonomi* (9 H. L. C. 503) considered.

THE nature of the action and the pleadings, the facts, and the respective applications made to the Court by the parties sufficiently appear from the judgments.

Feb. 22. *Cave, Q.C.*, for the plaintiff. All damage, whether actual or prospective, must be assessed in one action. The case of *Nicklin* v. *Williams* (1) is a conclusive authority in the plaintiff's favour. *Backhouse* v. *Bonomi* (2) has not overruled *Nicklin* v. *Williams* (1) on this point. Great difficulties would otherwise arise. If the plaintiff must bring a second action when fresh damage accrues there would be great difficulty in discriminating

(1) 10 Ex. 259; 23 L. J. (Ex.) 335. (2) 9 H. L. C. 503.

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between damage that had actually happened at the date of the first action, and so was included in the first assessment of damages, and the subsequent damage. The damage does not per se constitute the cause of action. There is no fresh cause of action when fresh damage arises. The cause of action is complete as soon as any damage arises. Consequently the proposition is, that two or more actions can be brought in respect of the same cause of action, which appears to be contrary to well-established principle. The same point arises in respect of actions for injuries produced by railway accidents. It could hardly be contended that a person injured in a railway accident could not recover for the prospective mischief to his constitution, but must prove only from time to time for the mischief already developed.

[He cited *Stroyan* v. *Knowles* and *Hamer* v. *Knowles* (1); Mayne on Damages, 2nd ed. pp. 58–63; *Roberts* v. *Read* (2); *Gillon* v. *Boddington*. (3)]

Gainsford Bruce, for the defendant. The essential element in this cause of action is the damage occasioned to the land. The cause of action is in respect of the damage accrued, not in respect of the act done, which is not tortious apart from the damage. The plaintiff is really seeking to recover in respect of a cause of action which has not yet happened and never may. There is no analogy between this case and cases where the act done is wrongful, as in the case of railway accidents. If the essential ingredient of the cause of action is damage, then the damage actually existing at the time of action brought is the measure of damage. There is the greatest difficulty and uncertainty in assessing prospective damage. A plaintiff may recover a large sum for damage that never actually happens, or, on the other hand, his claim for prospective damage may be rejected, and a large increase of damage may subsequently happen.

Cave, *Q.C.*, in reply. If the defendant's contention is correct it is strange that it has never been put forward before. In practice it has always heretofore been assumed that the prospective damages may be recovered.

(1) 6 H. & N. 454; 30 L. J. (Ex.) 102.

(2) 16 East, 215.

(3) Ry. & Mood. 161.

[He cited *Hodsoll* v. *Stallebrass* (1) and *Lord Townshend* v. *Hughes*. (2)]

Cur. adv. vult.

May 13. The following judgments were delivered:—

MANISTY, J. The plaintiff by his statement of claim alleged that his reversionary estate in certain land and buildings occupied by his tenants had been impaired and injured, first, by the defendant excavating and getting coal underneath his (the plaintiff's) land and buildings; and, secondly, by the defendant mining under his own land adjoining the plaintiff's land, and thereby withdrawing the support to which the plaintiff's land and buildings were entitled, whereby the plaintiff's land sank and gave way, and his buildings were weakened, cracked, and otherwise injured, and his estates in the said land and buildings were impaired.

The 4th, 5th, and 6th paragraphs of the plaintiff's statement of claim are in these terms:—

"4. The defendant has wrongfully excavated under the plaintiff's said land, and has taken away and disposed of coals and minerals of the plaintiff under the plaintiff's said land of the value of 100*l*.

"5. The defendant's said land was of right supported by the said adjoining land. The defendant, by mining under the said adjoining land, has withdrawn support to which the plaintiff was entitled.

"6. The plaintiff was also entitled to have the said public-house, cottages, and buildings supported by the said adjoining land. The defendant, by mining under the same, has withdrawn such support, to which the plaintiff was so entitled."

It is unnecessary to say anything about the first ground of complaint, because the damages in respect of it are found to be nominal.

The defendant brought into court the sum of 150*l*., and by his statement of defence alleged that it was enough to satisfy the claim of the plaintiff.

The plaintiff replied, denying that 150*l*. was enough to satisfy his claim, upon which issue was joined, and that was the only issue to be tried.

(1) 11 Ad. & E. 301. (2) 2 Mod. 150.

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By an order made by Master Manley Smith on the 19th of April, 1877, it was ordered that the action should be tried before Mr. Jacob Higson, of Manchester, civil engineer, as special referee, and that order was made a rule of this court.

On the 18th of August, 1877, Mr. Higson made his certificate and report as follows:—

"1. The plaintiff is entitled to recover from the defendant, in respect of the causes of action mentioned in the 4th paragraph of the statement of claim and admitted by defendant, the sum of one farthing only.

"2. I estimate the damage actually sustained by the plaintiff at the date of the commencement of the action, by reason of the wrongful acts of the defendant complained of by the plaintiff in the 5th and 6th paragraphs of the statement of claim, at the sum of 400*l.*

"3. I estimate the future damage which will be sustained by the plaintiff, by reason of the wrongful acts of the defendant complained of in the 5th and 6th paragraphs of the statement of claim, at 150*l.*

"4. The defendant has paid into court the sum of 150*l.*, but the items of damage above mentioned are estimated without the deduction of the said sum of 150*l.*

"5. I find the total damage sustained by the plaintiff, by reason of the wrongful acts of the defendant complained of by the plaintiff in the statement of claim, is the sum of 550*l.* 0*s.* 0¼*d.*, and, deducting the 150*l.* paid into court, the judgment ought to be entered for the plaintiff for the sum of 400*l.* 0*s.* 0¼*d.*"

It is noteworthy that the referee finds as a fact that further damage, to the extent of the 150*l.* now in question, will be sustained by the plaintiff, by reason of the wrongful acts of the defendant complained of in the 5th and 6th paragraphs of the statement of claim.

On the 11th of September, 1877, the plaintiff took out a summons calling upon the defendant to shew cause why he should not be at liberty to sign judgment for 400*l.* and one farthing, pursuant to Mr. Higson's certificate and report, and costs to be taxed. That summons was referred to this Court. On the 6th of November, 1877, a rule was granted by this Court calling upon the plaintiff

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to shew cause why, in the event of his not accepting judgment for 250*l.* over and above the sum paid into court, the damages given by the certificate and report of Mr. Higson should not be reduced to such sum as the Court might think fit, or why the trial should not be set aside and a new trial had, on the ground that the damages are excessive and contrary to the weight of evidence.

The case was argued on the 12th of January, 1878, before the Lord Chief Justice and myself, and we then declined to set aside the trial and grant a new trial, and we took time to consider whether the plaintiff was in the point of law entitled to recover the sum of 150*l.*, the amount of future damage, which the referee finds will be sustained by the plaintiff by reason of the defendant's acts.

That question was again argued before the Lord Chief Justice, Mr. Justice Mellor, and myself on the 22nd of February, and we took time to consider our judgment. I am of opinion that the plaintiff is entitled to recover the 150*l.*, and that, consequently, the rule to reduce the damages should be discharged, and the plaintiff should be at liberty to sign the judgment for 400*l.* and one farthing, and taxed costs.

The defendant, by paying money into court generally, has admitted all the material averments contained in the plaintiff's statement of claim. But it was contended on his behalf that inasmuch as his mining operations in his own land were not, per se, wrongful acts, the plaintiff's only cause of action was the "consequential damage" done to the plaintiff's property up to the time of the commencement of the action.

It was contended on the part of the plaintiff that, although he had no cause of action against the defendant until his land and buildings were injured, nevertheless, as soon as they were injured by the withdrawal by the defendant of the support to which they were entitled, he had a good cause of action, and that he could only recover damages once for all. It was further contended on his behalf that the true measure of his damages was the extent to which his reversionary estate was impaired or rendered less valuable by reason of the defendant's alleged wrongful act. I am of opinion that the plaintiff's contention is correct.

The cases relied upon by the defendant only decide that without

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"consequential damage" there was no cause of action. But there is no authority, so far as I know, for the proposition that damage, per se and apart from a wrongful act, can constitute a cause of action.

The plaintiff's right of action was to have his land and buildings supported by the subjacent and adjacent soil or strata, and so long as they were in fact supported, he had no cause of action; but so soon as the support which was left proved to be insufficient, and injury to the plaintiff's property ensued, then the defendant's act in withdrawing the necessary support became wrongful. Damnum and injuria concurred, and the plaintiff's cause of action then accrued. That point is, as it seems to me, concluded by the judgment of the House of Lords in *Backhouse* v. *Bonomi*. (1) But it is said on the part of the defendant that, assuming this to be so, the true measure of the damage recoverable in this action is the injury actually done to the plaintiff's land and buildings up to the time of the commencement of the action, and that his remedy for subsequent injury is by bringing actions from time to time as and when further injury accrues.

I am opinion, both upon principle and authority, that such is not the law: see *Nicklin* v. *Williams* (2), as explained and approved (upon this point) by the Exchequer Chamber in *Bonomi* v. *Backhouse* (3), and by the House of Lords in *Backhouse* v. *Bonomi* (1); see also *Hamer* v. *Knowles*. (4) It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. And it seems to me that in the present case there is but one and the same cause of action, namely, that which I have already mentioned.

It may be said that it would be more just and equitable in a case like the present that the plaintiff should only be entitled to recover the amount of damage actually done to his property up to the time of bringing his action, leaving him to recover subsequent damage, if any, by a subsequent action, or, if need be, by a series of subsequent actions. The same might have been said in many cases in which, however, the contrary principle has for a very long time been, and as I think wisely, acted upon. Take, for instance,

(1) 9 H. L. C. 503.
(2) 10 Ex. 259; 23 L. J. (Ex.) 335.
(3) E. B. & E. 646, 658.
(4) 6 H. & N. 454.

the case of the wrongful obstruction of light by means of the erection of a new building lawful in itself. In that case it might be said the plaintiff ought only to be allowed to recover the damage sustained up to the time of the commencement of his action, because possibly the obstruction may be removed, and therefore it would be unjust to permit the plaintiff to recover prospective damage unless and until it is actually incurred.

If that principle were adopted, one consequence would be that the Statute of Limitations would cease to be operative. A plaintiff might lie by until after the expiration of six years, without bringing any action, and then not only bring an action for the damage sustained during the period of six years next before action brought, but he would be entitled to bring a series of subsequent actions for the damage subsequently accruing. Again, take the case of slander actionable only by reason of special damage. The speaking of the defamatory word is damnum absque injuria, and consequently not actionable without special damage, just as the removal of the necessary support in the present case was damnum absque injuria, and not actionable until the plaintiff's property was injured, but I should suppose it would not be suggested that in such a case the plaintiff could only recover the damage actually sustained up to the time of bringing his action, and that for subsequent damage he might bring a subsequent action or a series of subsequent actions.

The fact is that the principle hitherto acted upon, namely, that a plaintiff must recover once for all, by one and the same action, all damage, past, present, and future, resulting from one and the same cause of action, may not always insure perfect justice, but as a rule it is, in my opinion a wholesome principle, and I doubt whether any better could be devised. It may be that in some exceptional cases, such, for instance, as injury sustained by a passenger, owing to the negligence of the carrier, some useful change might be made in the law. If so, that is a matter for the legislature. As the law stands, the passenger must recover once for all, because there is only one cause of action, and it seems to me that anything more disastrous than allowing a series of actions to be brought for damage arising from time to time in respect of the same cause of action could not well be conceived. If in the present case the reversioner must resort to successive actions for injury to his

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reversion, so must his several tenants for injury to their possession, and the consequence to the defendant would, I should think, be very much worse than that of having the damages assessed once for all in one and the same action.

In my opinion, the plaintiff is entitled to judgment for 400*l.* and one farthing and costs.

MELLOR, J. The facts of this case are set out in the judgment of my Brother Manisty, and it is not necessary for me to repeat them.

If I thought that the present case was not concluded by authority, and that we were at liberty to consider whether a better or more equitable rule might not be found in the reasons relied upon by the Lord Chief Justice, as leading to the conclusion at which he has arrived, I might hesitate as to the judgment I might form, but I think that this case is concluded by authority, and that I am not at liberty to treat the question as an open one.

The plaintiff in this action complained that he was damnified in respect of his reversionary interest in certain land and buildings, not only by mining excavations made by the defendant under his, the plaintiff's, premises, but also by mining excavations by the defendant made in his own land adjoining, the effect of which was to cause actual damage to the lands and houses to which the plaintiff was so entitled as reversioner, and it is with regard to the latter head of damage that the question upon which we differ arises. It cannot be disputed, since the case of *Backhouse* v. *Bonomi and Wife* (1), that the owner of land and minerals adjoining the land or lands and houses of another person cannot be prevented from the fullest exercise of his rights of property and dominion in his own land, so long as in the exercise of those rights he does not injuriously affect the corresponding right of the owner of the adjoining property, and no cause of action can arise to the owner of land by the exercise of such rights of ownership by an adjoining owner on his own property, until some actual damage has been thereby occasioned to his property. In the language of Lord Wensleydale in *Backhouse* v. *Bonomi* (1), "The plaintiff's right is not in the nature of an easement, but that the right is to

(1) 9 H. L. C. 503.

the enjoyment of his own property, and that the obligation is cast upon the owner of the neighbouring property not to interrupt that enjoyment."

The act of the defendant in this case, therefore, only became wrongful when it interrupted the enjoyment by the plaintiff of his own property. The damnum and injuria both combined as soon as the act of the defendant became wrongful. It is extremely important to ascertain at this point what it was which constituted the cause of action on the part of the plaintiff. The act done by the defendant, so long as he confined his excavations to his own property, was a lawful exercise of his right, but as soon as he, in the otherwise lawful exercise of his rights, excavated on his own land to an extent and in a manner which caused actual damage to the plaintiff's property, then the act, ipso facto, became tortious, and the plaintiff became entitled to maintain his action. It appears to me that it is not correct to say that the action is for damage only, because it will not lie until actual damage occurs. It is still the combination of the "injuria and damnum" which gives the right of action to the plaintiff, and the defendant becomes liable at once to the plaintiff for all the injurious consequences, whether present or in future, which result from the acts of the defendant, so become tortious, and whether he will bring his action immediately upon the manifestation of damage, or wait for further development of it, is at his option, but whether he elects to bring his action immediately or prefers to wait for the complete development of the mischief, subject to the risk arising under the Statute of Limitations, he can only, as it appears to me, have one action and one recovery for all the damage occasioned by the defendant's wrongful acts. This result is clearly established by the case of *Nicklin* v. *Williams* (1), which, although it must be considered as overruled by the case of *Backhouse* v. *Bonomi* (2), so far as it decided that, under circumstances exactly like the present, the cause of action really arose in respect of injury to the right of the plaintiff to have his premises supported by the land of the defendant, independently of actual damage thereto, still is, as it appears to me, a conclusive authority on the point of difference in this case; and Parke, B., in delivering the judgment of the Court

(1) 10 Ex. 259; 23 L. J. (Ex.) 335. (2) 9 H. L. C. 503.

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upon the argument on the demurrer in that case, said, "For this wrong the plaintiffs would have a right to recover a full compensation, including the probable damage to the fabric; and if they had already obtained a verdict with damages, they must be presumed to be satisfied for all the consequences of the wrong; and if, instead of having a verdict, they receive with their own consent a satisfaction, such satisfaction is to be considered to compensate for all the consequences of the wrong."

The question in that case was distinctly raised by the new assignments, and was whether on fresh damage arising after an agreement by way of accord and satisfaction had been made, a new cause of action could arise. That the case of *Nicklin* v. *Williams* (1) was rightly decided, so far as it affects the matter now in controversy, appears from the judgment of the House of Lords in *Backhouse* v. *Bonomi* (2), in which the Lord Chancellor, Lord Westbury, referring to it, says: "With regard to *Nicklin* v. *Williams* (1) the decision of that case is beyond all question. Some of the dicta which have been relied upon by the counsel in that case are not necessary for the decision that was there pronounced." I cannot see any distinction between the present case and that. In the present case the tortious act which occasioned the damage is identical in character with that in *Nicklin* v. *Williams* (1), and compensation for the resulting damage must be obtained by one and the same recovery. It might in the present case be a convenient course to wait and see whether further damage will actually result instead of assessing it as probable, but I can only answer that the same suggestion has frequently arisen and been constantly overruled, as being inconsistent with an elementary rule of law. In *Bonomi* v. *Backhouse* (3) Wightman, J., says: "The plaintiffs can only recover to the extent of the damage they have actually sustained, which may include not merely what they are obliged to lay out in actual repair, but the diminution in the value of the premises by reason of the damage;" and Coleridge, J. (4), said: "Where a right of action is thus vested, and an action is brought for the act alleged to have so injured it, the damages given by the jury for that act must

(1) 10 Ex. 259; 23 L. J. (Ex.) 335.
(2) 9 H. L. C. 503.
(3) E. B. & E. 646.
(4) E. B. & E. at p. 641.

be taken to embrace all the injurious consequences of that act, unknown as well as known, which shall arise hereafter as well as those which have arisen. For the right of action is satisfied by one recovery." And in the same case in error Willes, J., delivering the judgment of the Court of Error (1), commenting on *Nicklin* v. *Williams* (2), says: "For before the former action was commenced it was obvious that actual damage had been sustained; in which case another principle applies, viz., that no second or fresh action can under such circumstances be brought for subsequently accruing damage; all the damage consequent upon the unlawful act is in contemplation of law satisfied by one judgment or accord." I am unable to see anything in the present case to take it out of the rule so clearly established, viz., that there can only be one recovery for all the damage resulting from the same wrongful act, whether it be all then manifest, or is only likely to result from it; as it appears to me you cannot divide the injurious consequences into sections, and refer each new damage as it occurs to some new tortious act by the defendant, there being in fact only one tortious act committed, and to stop at a given point, and so divide the damage already accrued from the damage which may be still further developed would be a violation of the rule as to one recovery or one award to which I have referred. If I am right in what I have said, that in every cause of action there must combine an "injuria and a damnum," then I cannot doubt that the arbitrator was right in assessing not only the actual manifest damage, but also in assessing the future damage within the 5th and 6th paragraphs of the plaintiff's claim; and that consequently the plaintiff is entitled to the judgment of the Court.

COCKBURN, C.J. This is a case of considerable importance as a corollary on the leading case of *Backhouse* v. *Bonomi* (3), and which as it seems to me, depends in a great measure on the effect to be given to the decision in that case.

Taking the view I do of that decision, I am unable to concur in holding that, in addition to the amount to which he may be entitled for actual damage sustained through the excavation of the

(1) E. B. & E. 658. (2) 10 Ex. 259; 23 L. J. (Ex.) 335.
(3) 9 H. L. C. 503.

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adjacent soil by the defendant, the plaintiff is entitled to recover in respect of prospective damage, that is to say anticipated damage expected to occur, but which has not actually occurred and which never may arise. The fundamental principle on which the decision in *Backhouse* v. *Bonomi* (1) proceeds is, that no cause of action arises in respect of what a man does on his own land, until actual damage arises therefrom to the property of the adjoining owner. According to that decision there is no abstract right of support, independent of acquired easement, from adjacent strata, and the removal of such strata constitutes in itself no wrong. No wrong arises to A., from the excavation of B., on his own soil though the stability of A.'s adjoining land may be thereby endangered, unless and until A. sustains actual damage therefrom. And the reason is that the law does not recognise any right in A. to the support of the adjacent soil, otherwise than as involved in the larger proposition that he is entitled to the enjoyment of his own property undiminished and unaltered by any use which B. may make of his. B. may use his own property as he pleases, provided in so doing he does not do actual damage to his neighbour's property or diminish or disturb his neighbours' enjoyment of it. This view of the law, ably expounded in the judgment of Mr. Justice Wightman, when the case of *Bonomi* v. *Backhouse* (2) was in the Court of Queen's Bench, was fully adopted and made the basis of their judgments by Lords Cranworth, Wensleydale, and Chelmsford in the House of Lords (1), and is quite consistent with the reasoning of Willes, J., in delivering the judgment of the Exchequer Chamber (3). The learned judge there speaks of the right of action as "arising from the damage, not from the act of the adjoining owner on his own land," observing that "the law favours the right of dominion by every one upon his own land and his using it for the most beneficial purpose to himself." The language of Lord Cranworth is express on the point. He says, "I think the error in the view which has sometimes been taken on the subject is this; it has been supposed that the right of the party, whose land is interfered with, is a right to what is called the pillars or the support. In truth, his right is a right to the ordinary enjoyment of his land; and till that ordinary enjoyment is interfered with,

(1) 9 H. L. C. 503. (2) E. B. & E. 622. (3) E. B. & E. 654.

he has nothing of which to complain. That seems to be the principle on which this case ought to be disposed of." The language of Lord Wensleydale was to the like effect. He says, "the plaintiff's right was to the enjoyment of his own property, and the obligation cast on the owner of the neighbouring property was not to interrupt that enjoyment." Lord Chelmsford concurred in what had been said.

In this view the mere withdrawal of the support afforded by the adjacent or subjacent strata, by the excavation of the adjoining soil, gives of itself no right of action to the adjoining owner, not even though, from the knowledge of the fact of such excavation having been made, and the apprehension of possible consequential damage, or even the certainty that such damage must result, the value of the property should be prejudicially affected. Hence, too, if, by the substitution of artificial for the natural support, the excavating owner can avert the mischief which would otherwise arise, no wrong is done and no cause of action accrues. In both cases the owner has only done what he pleased with his own; in neither has there been any actual interference with his neighbour's enjoyment of his property. It is true that the case might have admitted of a different view, a view quite as much in accord with legal principle, and which had previously been adopted by text writers and indeed by the Courts, as in *Humphries* v. *Brogden* (1) and other cases, namely, that the owner of adjoining property was entitled, as an incident of property, to the support of the adjoining soil; and that if that support was withdrawn and his property was thereby endangered, and its value consequently lessened, there was both injuria and damnum, and therefore a right of action. But this view included the difficulty and embarrassment which in *Bonomi* v. *Backhouse* (2) it was sought to avoid, arising from the operation of the Statute of Limitations. Or, independently of any assumption of the right of support, it might be said that a man who by thus dealing with his own property diminishes, from the possibility of future damage, the value of his neighbour's, violates thereby the maxim, "Sic utere tuo ut alienum non lædas," a maxim which our law has adopted with regard to the enjoyment of adjoining properties, though here again the same difficulty would

(1) 12 Q. B. 739; 20 L. J. (Q. B.) 10. (2) E. B. & E. 658; 9 H. L. C. 503.

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occur: a cause of action having once arisen, though possibly unknown to the party whose right was affected, the statute would begin to run. But such was not the view taken in the Exchequer Chamber and the House of Lords in *Bonomi* v. *Backhouse* (1), judgments by which we of course are bound. The decisions—decisions of the two highest Courts, in that case establish conclusively and incontrovertibly that it is not the withdrawal of the support previously afforded by the adjacent strata—a support to which, according to the view there taken, the adjoining owner had abstractedly no right—but the actual disturbance of his enjoyment of his property which constitutes a wrong and gives a legal ground of complaint. The effect of the decision is that there is no abstract right to the support of the soil; consequently, that the withdrawal of the support does not create a wrong—an injuria absque damno; it is only when the damnum presents itself, that that which has been done becomes wrongful. The injuria is the effect of the damnum. The act of the excavating owner is not tortious in se; it is tortious only when it produces, and, as it seems to me to follow logically, to the extent to which it produces, actual damage.

This being so, it appears to me not only logically, but practically, inconsistent with this principle to hold that, because an adjoining owner has sustained actual damage to a limited extent, from excavation of adjoining soil, he can recover in the same action not only in respect of damage actually sustained, but also in respect of prospective damage which has not yet arisen, and which possibly never may arise at all. If permitted to do so he would thus be entitled to recover compensation in respect of a wrong which he has not as yet sustained, a wrong as yet undeveloped and which has not yet in the legal view of the matter come into existence, a proceeding at variance with all principle. Equally at variance with principle is it, when it is borne in mind that it is only by reason of and to the extent of realised damage that the act of the defendant becomes wrongful, to hold him responsible for that which, though it may possibly become wrongful hereafter, as yet is not so. Moreover, the defendant has, I apprehend, at any time before the damage has actually occurred, a perfect right to have recourse to any artificial means of which he can avail himself to

(1) E. B. & E. 658; 9 H. L. C. 503.

prevent its occurrence. What, if some damage having occurred, so as to give the plaintiff a cause of action, the defendant were to have recourse to some possible means to arrest the further progress of the mischief; would the plaintiff be entitled, notwithstanding this, to recover in respect of the damage which might otherwise have arisen, but which has thus been averted? Can the plaintiff, by bringing his action immediately on the happening of a slight amount of damage, and claiming therein for prospective damage, which it is assumed will happen at some future time, thereby deprive the defendant of his right to prevent such future damage by recourse to artificial means? The law, beyond all question, allows him to avert all liability on account of possible damage in respect of the entire amount of damage which may result from his operations. If finding that some damage has arisen, possibly contrary to his expectations, he seeks to prevent further mischief, I am at a loss to see on what principle he is to be prevented from taking measures to do so. Yet such would be the effect of this decision.

Of course I do not lose sight of the rule that damages resulting from one and the same cause of action must be assessed and recovered once and for all. But the rule seems to me to have no application in the present case, it being, in my view of the effect of *Backhouse* v. *Bonomi* (1), a mistake to say that the plaintiff had a right to the support of the adjacent strata, and that the removal of these constituted a violation of this right, by reason of which, when damage supervened, a cause of action arose. The plaintiff, as I read the judgment in *Backhouse* v. *Bonomi* (1), had no right to the support of the strata. His only right was to the undisturbed enjoyment of his own property, and it was only when, and so far as that enjoyment was interfered with, that he sustained a wrong. It is not enough to say that the value of the plaintiff's property has been diminished by the withdrawal of the support. It is not the diminished value of the property which makes the withdrawal of the support wrongful; otherwise any appreciable diminution in the value, consequent on the removal of the support, from prospective damage which might properly be anticipated to result from it, would constitute, independently of

(1) 9 H. L. C. 503.

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actual damage, a damnum in respect of which a plaintiff could recover, a position which, according to *Backhouse* v. *Bonomi* (1), certainly cannot be maintained.

It being thus the present and actual interruption of the plaintiff's enjoyment, and not the removal of the support, which constitutes the wrong and gives a cause of action, it must, as it seems to me, follow that a present interruption can only give a cause of action to the extent to which it has gone. It cannot constitute a cause of action in respect of a future interruption which has not yet occurred. The subsidence of a hundred yards which takes place to-day is one thing; the subsidence of another hundred yards, which takes place twelve months later, is not the effect of the first. It is in no way connected with it except so far as both are the effect of a common cause. Both, it is true, spring from the same cause, namely, the excavation of the subjacent strata; but as the excavation and the consequent removal of the support is not in itself wrongful, or a cause of action, the damage which happens at one time and that which happens at another, though arising physically from the same cause, cannot be said to arise from a common cause, or consequently from a common cause of action. Each fresh interference with the enjoyment of property is, as it arises, a wrong done, and creates a further cause of action. It is not damage referable to a cause of action antecedent to itself. The rule relied on does not therefore seem to me to apply to such a case. My Brother Mellor puts the argument in favour of the opposite view in a very striking form. He says that the removal of the adjacent strata, though not tortious till damage accrues, becomes so as soon as it does, so as to embrace all the damage which may at any time arise from it. I readily admit that if this construction is to be put on the decision of the House of Lords, the consequence contended for follows. But the language used by Lords Cranworth and Wensleydale does not appear to me to admit of such a construction; according to it the plaintiff had no right to the support, and the removal of it never could be tortious. It is only the means by which a wrong becomes committed. The wrong consists in causing the plaintiff's premises to fall; consequently it extends only so far as the actual damage goes. Hence

(1) 9 H. L. C. 503.

each fresh damage becomes a fresh wrong and fresh cause of action.

In a matter depending, as I think this does, on legal principles, considerations of convenience or inconvenience can scarcely be admitted. At the same time I am not insensible to the inconvenience which may result to a defendant from being exposed to successive actions as fresh damage may arise. But independently of the fact that in many instances he may, by recourse to artificial means, prevent further subsidence, there are other considerations of convenience by which this inconvenience to the defendant may well be counterbalanced. If on an action being brought for damage which has actually occurred, it were necessary to go into the question of possible future damage where there was a possibility of such damage arising, both parties would be exposed to the inconvenience of a speculative inquiry, depending on the uncertain and often unsatisfactory evidence of experts—a consideration which appears to have had considerable weight in determining the decision of the Exchequer Chamber in *Bonomi* v. *Backhouse*. (1) "The jury, according to this view," says Mr. Justice Willes, "would have to decide the speculative question whether any damage was likely to arise; and it might well be that in many cases they would, upon the evidence of mineral surveyors and engineers, find that no damage was likely to occur when the most serious injury might in fact occur, and in others find and give large sums of money for apprehended damage which in point of fact never might arise." "This," adds the learned judge, "is certainly not a state of the law to be desired. In many cases damages would be given where none could be sustained, while they would in other cases be given where they ought to be withheld." In this view I entirely concur. Nothing I think could be more unsatisfactory than an inquiry into the possible future effect of underground operations, or more uncertain than its result, depending, as it must do, on the opinion of experts taking the widest range, as dealing with the unknown future, with the elasticity which generally characterises the formation of professional opinion as exhibited in courts of justice. Yet if the proposed doctrine is to be sustained, it is obvious that, in every case in which an action is brought in respect of actual

(1) E. B. & E. 658.

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damage, it will be necessary to go into the question of prospective or speculative damage, as, if the doctrine I am dealing with is correct, the plaintiff having brought an action, would be for ever shut out from bringing another on account of subsequent damage if such damage should afterwards occur. Moreover, this inconvenience would be seriously aggravated by the fact that whenever appreciable damage had resulted, however limited its extent, a plaintiff would be compelled not only to bring his action, though he might think the damage not sufficient to make it worth while to enter into litigation, but also to go into the whole question of speculative future damage, lest he should be barred by the Statute of Limitations in respect of future damage, however serious, which might accrue after the expiration of the statutory period. For whether the removal of the support is taken to be wrongful, and on the supervening of damage as amounting to a cause of action, or whether the interference with the enjoyment of the adjoining property is taken to constitute the wrong and to be the cause of action, as soon as the cause of action is complete, the statutory time will begin to run, and the party wronged, who might otherwise have been contented to wait to see if further damage would arise, will be without redress, however serious the injury he may sustain, if that injury should occur after the period of limitation has run out. The effect of all which must I think be to enlarge the sphere of such litigation and to add greatly to its difficulty and expense. The balance of convenience appears to me therefore to be here consistent with legal principle.

On the whole I am of opinion that the plaintiff cannot recover in respect of the prospective damage.

Judgment for the plaintiff.

Solicitors for plaintiff: *Iliffe, Russell, & Iliffe, for Crowther.*

Solicitors for defendant: *Ridsdale, Craddock, & Ridsdale, for Watson.*

Ex parte TODD.

1878
May 13.

Public-house—Licence to sell Exciseable Liquors—Licensed Person giving up possession of Premises during the continuance of the Licence—New Tenant —Application to Special Sessions—9 Geo. 4, c. 61, ss. 4, 13, 14.

The power of granting a licence at special sessions under 9 Geo. 4, c. 61, s. 14, to a new tenant, where a person duly licensed under that Act gives up possession of the house during the continuance of his licence, extends only to the period for which the former tenant's licence would have lasted.

F., duly licensed under 9 Geo. 4, c. 61, on the 3rd of August, 1877, gave up possession of the licensed premises, and B. became tenant. The licence expired on the 10th of October following. At the general annual licensing meeting, held on the 28th of August, 1877, B. applied for a transfer of the licence to him, but the justices refused the application on the ground of his previous misconduct. On the 28th of September B. gave up his tenancy, and was succeeded by G., who on the 29th of November also gave up the tenancy, and was succeeded by T. After giving the proper notices, T. applied at a special sessions, under s. 14 of 9 Geo. 4, c. 61, for a licence in respect of the premises. The justices declined to entertain the application, on the ground that they had no jurisdiction:—

Held, that, inasmuch as the application was made after the expiration of the period for which the previous licence remained in force, the decision of the justices was right.

Semble (per Cockburn, C.J., and Manisty, J.), that the power to grant a licence under s. 14 is not confined to the case of the tenant immediately succeeding the outgoing holder of the licence.

MOTION for a rule calling upon Sir R. Gilpin and certain justices of the division of Leighton Buzzard to shew cause why a mandamus should not issue to compel them to hold a special licensing sessions, and to hear and determine an application of one Robert Todd for a licence to sell exciseable liquors upon a house and premises at Leighton Buzzard.

On the 22nd of August, 1876, at a general annual licensing meeting held at Leighton Buzzard, a licence to sell exciseable liquors to be drunk and consumed on premises called the White Lion was granted to George Stevens.

George Stevens was a yearly tenant of the White Lion, and on the 23rd of May, 1877, in pursuance of an arrangement between himself, his landlord, and one Thomas Farebrother, Stevens' tenancy was determined, and Farebrother became tenant in his place and entered into occupation of the premises.

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On the 12th of June, 1877, at a special licensing sessions, Stevens' licence was transferred to Farebrother.

On the 3rd of August, 1877, Farebrother, by arrangement, gave up possession of the premises to Esau Bull, who thereupon entered into occupation and became tenant of them.

On the 3rd of August, 1877, Farebrother gave notice of his intention to apply at the general annual licensing meeting to be held on the 28th of August, 1877, for a transfer of his licence to Bull.

On the 14th of August, 1877, the justices gave Bull an authority, under 5 & 6 Vict. c. 44, s. 1, to sell exciseable liquors on the premises until the 28th of August.

On the 28th of August, 1877, at the general annual licensing meeting, the justices refused to grant the transfer of the licence to Bull on the ground of his previous misconduct.

On the 11th of September, 1877, the justices gave Bull a further authority to sell until the 25th of September, 1877, being the day to which the general annual licensing meeting had been adjourned. The justices intimated that they would then reconsider the application for a transfer.

On the 25th of September, 1877, the application for a transfer of the licence to Bull was renewed accordingly, and was refused by the justices.

On the 28th of September, 1877, Bull gave up his tenancy to William Goldsworth, who entered upon the occupation of the premises. On the 10th of October the licence expired.

On the 23rd of October, 1877, at a special sessions, Goldsworth applied for a transfer or renewal of the licence to himself. The justices declined to entertain the application, on the ground that the proper notices had not been given under 9 Geo. 4, c. 61, s. 14.

On the 29th of November, 1877, Goldsworth gave up his tenancy to Robert Todd, who entered into occupation of the premises.

On the 29th of December, 1877, Todd gave due notice of his intention to apply at a special sessions to be holden on the 22nd of January, 1878, for a licence to sell exciseable liquors on the premises.

On the 22nd of January, 1878, Todd applied for a licence accordingly under 9 Geo. 4, c. 61, s. 14, and the justices refused

the application on the ground that they had no jurisdiction to entertain it. (1)

Graham moved for a rule as above mentioned. The justices decided on the authority of *Simpkins* v. *Justices of Birmingham* (2); but that case differs from the present one, because there the outgoing tenant, who held the licence, did not quit the premises until after the licence had expired, and so there was no removal from the tenancy of a person "so licensed" within the meaning of s. 14. Todd, in the present case, was a "new tenant"

(1) 9 Geo. 4, c. 61, s. 4, enacts, that the justices assembled at the general annual licensing meeting "shall appoint not less than four, nor more than eight, special sessions to be holden in the division or place for which each such meeting shall be holden in the year next ensuing such general annual licensing meeting at periods as near as may be equally distant, at which special sessions it shall be lawful for the justices then and there assembled in the cases and in the manner and for the time hereinafter directed, to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns as they the said justices shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper persons, under the provisions hereinafter enacted, to be licensed to sell exciseable liquors by retail to be drunk or consumed on the premises."

Sect. 13 enacts that every licence shall be in force in Middlesex and Surrey from the 5th day of April, and elsewhere from the 10th day of October, after the granting thereof, for one whole year thence respectively ensuing, and no longer.

Sect. 14 enacts, "That if any person duly licensed under this Act shall (before the expiration of such licence) die, or shall be, by sickness or other infirmity, rendered incapable of keeping an inn, or shall become bankrupt; . . . . or if any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have neglected, to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail to be drunk or consumed in such house; . . . . it shall be lawful for the justices assembled . . . . . at a special session holden under the authority of this Act for the division or place in which the house so kept or having been kept shall be situate in any of the above-mentioned cases, and in such cases only, to grant to the heirs, executors, or administrators of the person so dying, ... or to any new tenant or occupier of any house having so become unoccupied . . . . a licence . . . . : Provided always, that every such licence shall continue in force only from the day on which it shall be granted until the 5th day of April or the 10th day of October then next ensuing as the case may be."

(2) Law Rep. 7 Q. B. 482.

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or occupier of the premises. The statute does not require that the new tenant should immediately succeed the "duly licensed" outgoing tenant; any "new tenant" will do.

[COCKBURN, C.J. But you are here applying for a new licence, not for a renewal of the old one. Sect. 14 does not apply in any case where the previous licence has already determined.]

It is submitted that s. 14 intends to substitute in the particular cases special sessions for the general annual licensing meeting. It would be a hardship on the occupier that under circumstances like these the premises should remain unlicensed until the next general annual licensing meeting.

COCKBURN, C.J. I entertain no doubt whatever that the purpose of s. 14 is to keep alive existing licences which have not run out by efflux of time, where, upon the death or bankruptcy of the occupier, the licence would otherwise become useless, and in certain other cases. But I think that, by providing for the special cases to which s. 14 immediately refers, it was not intended to interfere with the general rule as to the expiration of licences. The legislature thought it hard that, on the death or bankruptcy of a former occupier, the person interested in the licensed premises should not have the opportunity of keeping on the sale of excise-able liquors until the licence would expire, and it was therefore provided that special licensing sessions might be held, in order that the parties succeeding to the occupation might get the benefit of the existing licence until the next general annual licensing meeting. But it was never intended to do anything further than that.

Now, here it is clear that no attempt was made to renew the licence before the 10th of October; the time was allowed to expire for which the licence had been granted, and then an application was made under s. 14 for leave to continue to sell under the old licence, or for a new licence. It may be hard upon the landlord that he cannot obtain another licence for his house until the next general annual licensing meeting, but the hardship has arisen from two things, first, that he put in as tenant a person of whose character the justices did not approve; and secondly, that he did not take care to apply himself before the expiration of the

old licence. I think that s. 14 cannot be brought in to assist him now. The application must be during the pendency and currency of the period for which the old licence was in force. That period had expired before the application was made, and I am of opinion the justices had no jurisdiction, and that this motion must be refused.

MELLOR, J. I am of the same opinion. I am inclined to doubt whether, according to the strict construction of the section, Mr. Graham is right in saying that "any new tenant" would satisfy the section. I rather think it is confined to the person who immediately succeeds the person who had the licence. That would be Mr. Bull in this case. But I agree with my Lord generally on the construction of s. 14. The application was made after the old licence had expired, and I think the justices were quite right in not entertaining it.

MANISTY, J. I am of the same opinion. The whole tenor of s. 14 shews that it is confined to certain cases, such as death, removal, &c., during the continuance of the existing licence; because if a person in occupation dies or removes before the 10th of October, what is it that the justices are empowered to grant to his executors or to the new tenant? It is a right to sell excise-able liquors, provided that the right shall not extend beyond the period at which the previous licence expires. I think that *Simpkins* v. *Justices of Birmingham* (1) is conclusive on that point. Therefore the new tenant must come in during the continuance of the licence. I also think that any tenant who comes in during that period will satisfy the requirements of the statute.

COCKBURN, C.J. I should add that I agree with my Brother Manisty on the last point, although it is not necessary to decide it in this case. I think that any new tenant who came in, and answered the description otherwise in the section, could apply under s. 14.

Rule refused.

Solicitors: *Berkeley & Calcott, for Newton, Leighton Buzzard.*

(1) Law Rep. 7 Q. B. 482.

1878
May 13.

STALLARD AND OTHERS, APPELLANTS; MARKS, RESPONDENT.

Spirituous Liquors and Wines—Selling by Retail without Excise Licence—Orders taken by Traveller occupying House and Premises—Spirits not stored on Premises where Orders received—6 Geo. 4, *c.* 81, *s.* 2—23 *&* 24 *Vict. c.* 27, *s.* 19—30 *&* 31 *Vict. c.* 90, *s.* 17.

The appellants were convicted under 6 Geo. 4, c. 81, s. 2, for retailing spirits in Cheltenham without a retailer's Excise licence. They carried on business as wine and spirit merchants in Worcester, and held all the necessary licences for dealing in and retailing spirits there. They did not hold a licence to retail spirits at Cheltenham; but they caused premises at Cheltenham to be let to D., one of their travellers, for their own use, took out a licence for the purpose of carrying on there the business of dealers in beer, and put up a board inscribed with their names as "Distillers, Wine Merchants, and Brewers, Worcester." D. took orders for spirits at these premises and transmitted them to Worcester, where the appellants executed them by sending spirits from Worcester:—

Held, that the conviction must be affirmed, for the appellants must be taken to carry on business at Cheltenham as retailers of spirits, although the spirits they sold were kept in and delivered from a store in another town.

CASE stated by justices for Gloucester under 20 & 21 Vict. c. 43.

1. The appellants were convicted upon an information charging that they being persons retailing spirits, for the retailing of which a licence was required by statute, at Cheltenham did retail spirits, to wit, one gallon of whiskey, without taking out such licence as required by the statute; and, further, that the appellants, after the passing of 23 & 24 Vict. c. 27, at Cheltenham did sell wine by retail, to wit, three quarts of sherry and three quarts of port, without having a proper licence in force authorizing them in that behalf.

2 & 3. Upon the hearing of the information it appeared that the appellants had been in business as wine and spirit merchants in Worcester for a great number of years, and at the time alleged in the information held at Worcester all the licences the law required for dealing in and retailing spirits and wines, but did not hold at Cheltenham licences to retail spirits or wines, though they, with their co-partner in the beer trade, Richard Stallard, held a

licence for dealing in beer at Cheltenham, and kept a stock of beer there.

4. In accordance with the directions of the supervisor of excise of the Cheltenham district, an officer of the Inland Revenue, on the 2nd of January last visited an office, No. 54A, in Winchcomb Street, Cheltenham, and observed upon the premises a board set up with these words printed upon it, "Josiah Stallard & Sons, Distillers, Wine Merchants, and Brewers, Worcester. Established 1808. Wine Merchants to the Queen." Upon the window blind were printed also these words: "Established 1808. Stallard & Sons, Distillers, Wine Merchants, and Brewers, Worcester." Mr. Fitzgibbon ordered of Mr. Dredge (whom he saw in the office, and whom he described in his examination as "clerk or traveller") one gallon of whiskey, three bottles of port, and three bottles of sherry, for which he paid him 33s. and took his receipt. Mr. Dredge stated that the goods would be supplied from Worcester, and having taken Mr. Fitzgibbon's name and address, sent the order in due course to the appellants' place of business at Worcester.

5. In a day or two afterwards a jar containing the gallon of whiskey and a case containing the three bottles of port and three bottles of sherry were sent by railway from Worcester to Mr. Fitzgibbon's address in Cheltenham, and on the day the goods were forwarded from Worcester an invoice, made out in the appellants' name, was also sent him by post from Worcester.

6. Mr. Dredge stated in his evidence before the justices that he resided at Cotswold Terrace, in Cheltenham, and was a traveller in the employ of the appellants, and worked the Cheltenham district, and that his sole employment was to receive orders for the appellants to be executed at Worcester, and at first he used to drive about for orders and had never given up doing so, but in September last year, for convenience, he took in his own name, as yearly tenant, two rooms, being the office before adverted to, No. 54A, Winchcomb Street, and the beer store adjoining, for which he had since paid the rent, and the receipts were made out in his name, but he was reimbursed in the shape of expenses; that no stock of wine or spirits had at any time been kept upon the premises, but the appellants, with their co-partner in the beer

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trade, Richard Stallard, held an Excise licence for storing or keeping beer there.

7. On the 16th of last November the appellants and the said Richard Stallard, in the Excise official paper they signed making entry of these premises for the purpose of storing and keeping beer for dealing, described themselves as of 54A, Winchcomb Street, Cheltenham, and being dealers in beer, and the said premises, so entered by the appellants and Richard Stallard for storing beer there, were the same premises in which the said order for wines and spirits was taken, and were held under one and the same agreement at one gross rent for the whole, which rent was paid by Mr. Dredge and repaid to him as expenses.

8. The appellants contended that the premises 54A, Winchcomb Street, were rented by Mr. Dredge on his own account as a convenient place to take orders, and were not used for retailing spirits or wines, and that no spirits or wines ever were stored or kept in them, and although he was recouped the rent and any other payments he might make, the reimbursement was in the nature of expenses which he was entitled to receive in addition to his commission, and did not make the premises the appellants'; that Mr. Dredge was the bonâ fide traveller of the appellants in the Cheltenham district, and as he carried on his business as such in these stationary premises as well as by calling at places to obtain orders, that the transaction with Mr. Dredge was an order for the spirits and wines which he did not execute, but sent to Worcester to be executed there by the appellants, and that the goods were sent direct from Worcester to the purchaser; that the appellants did not carry on their spirits or wine business in any other place than Worcester, and had not retailed any spirits or wines in Cheltenham.

The respondent contended that the premises No. 54A, Winchcomb Street were premises occupied and used by the appellants for retailing wines and spirits, that the sale of the whiskey and sherry and port wines there by Mr. Dredge was perfect and complete, and amounted in law to a retailing of these spirits and wines by the appellants.

The question for the opinion of the Court was, whether upon the above facts the conviction was right?

Feb. 21. *Forbes*, for the appellants.
C. Bowen, for the respondent.

The nature of the arguments is explained in the judgment.

Cur. adv. vult.

May 13. The judgment of the Court (Cockburn, C.J., and Manisty, J.) was delivered by

MANISTY, J. This was an appeal against a conviction of the appellants for retailing spirits in Cheltenham without having a retailer's Excise licence.

The appellants carried on business as wine and spirit merchants in Worcester, and held all the licences the law required for dealing in and retailing spirits and wines there, but they did not hold a licence to retail spirits at Cheltenham, though they with their co-partner in the beer trade (Richard Stallard) held a licence for dealing in beer at Cheltenham, and kept a stock there.

The justices convicted the appellants for retailing spirits in Cheltenham without having taken out the proper Excise licence, and the question is whether, upon the facts proved before them, they were right in so doing.

The case was argued before the Lord Chief Justice and myself on the 21st of February last, and we took time to look into the Acts of Parliament to which our attention was called (1); and, having done so, we are of opinion that the conviction was right.

(1) By 6 Geo. 4, c. 81, s. 2, every retailer of spirits in England is required to take out an Excise licence. By s. 10, no one licence taken out under or by authority of this Act by any person or persons, except auctioneers and maltsters, shall authorize or empower such person on persons to exercise or carry on the trade or business mentioned in such licence, in more than one separate and distinct set of premises, such premises being all adjoining or contiguous to each other, and situate in one place and used together for the same trade or business, and of which he, she, or they shall have made lawful entry, to exercise or carry on therein his, her, or their trade or business as aforesaid, at the time of granting such licence, but that a separate and distinct licence shall be taken out by all and every such person or persons as aforesaid, except as aforesaid, to exercise or carry on his or their trade or business as aforesaid or in any other or different premises than as before mentioned: Provided always, that where the amount or rate of any such licence shall depend upon the quantity of goods made or manufactured by the person or persons to whom the same is granted, such quantity shall be computed from the respective goods only made or manufactured by such person

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11 QBD 642

The information in the present case was laid for retailing spirits in Cheltenham without a licence, contrary to the provisions of 6 Geo. 4, c. 81, and not for taking an order for spirits contrary to the provisions of 30 & 31 Vict. c. 90, but this latter statute was relied upon on behalf of the appellants, and it was contended that they did not carry on the business of retail dealer in spirits at 54A, Winchcomb Street, Cheltenham; that the transaction in question was simply a taking of an order for spirits by a Mr. Dredge, as their bonâ fide traveller in the Cheltenham district, and that the order was executed by the appellants at Worcester. If that contention were well founded, the appellants incurred no penalty, but we think it is not.

The facts are stated at length in paragraphs 4, 5, 6, 7 of the case, but may be shortly stated thus:—

Premises known as 54A, Winchcomb Street, Cheltenham, were let to Mr. Dredge, who was a traveller in the employment of the

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or persons at the premises in respect of which such licence is granted, and shall not include goods made or manufactured by such person or persons at any other or different premises, for which a separate licence is required as above mentioned.

By s. 26, "if any person or persons shall make or manufacture, deal in, retail, or sell any goods or commodities hereinafter mentioned, or shall exercise or carry on any trade or business hereinafter mentioned for the making or manufacturing or dealing in, retailing or selling of which goods or commodities or for the exercise or carrying on of which trade or business a licence is required by this Act without taking out such licence as in that behalf required, he, she, or they shall for every such offence respectively forfeit and lose the respective penalty thereupon imposed, as hereinafter follows (that is to say):—Every retailer of spirits not being a retailer of spirits in Ireland—every retailer of foreign wine—shall respectively forfeit 50*l*."

By 23 & 24 Vict. c. 27, s. 19, "every person who shall sell any wine by retail, whether to be consumed on the premises or not, without having a proper licence in force duly authorizing him in that behalf, shall over and above any penalty to which he may be liable forfeit the sum of 20*l*., which shall be denominated an Excise penalty."

By 30 & 31 Vict. c. 90, s. 17, "if any person shall solicit, take, or receive any order for spirits, wine, or other article for the dealing in retailing or selling whereof an Excise licence is by law required, without having in force a proper Excise licence authorizing him so to do, he shall forfeit the penalty imposed by law upon a person dealing in, retailing, or selling such article without having an Excise licence in force authorizing him so to do: Provided always that nothing herein contained shall be deemed to apply to impose a penalty upon a bonâ fide traveller taking orders for goods which his employer is duly licensed to deal in or sell."

appellants, and took orders for them in a district called the Cheltenham district. These premises were occupied by him for the use of the appellants. They recouped him the rent which he paid to the landlord. They entered the premises as their own for the purpose of storing and keeping beer. They took out a licence for the purpose of carrying on the business of dealers in beer. They put up a board upon them with the following words printed upon it:

"Josiah Stallard & Son,
"Distillers, Wine Merchants, and Brewers, Worcester.
"Established 1808. Wine Merchants to the Queen."

Upon the window-blind were printed these words:

"Established 1808. Stallard & Son,
"Distillers, Wine Merchants, and Brewers, Worcester."

Mr. Dredge, acting for the appellants, took orders for spirits at 54A, Winchcomb Street, Cheltenham, and transmitted the orders to Worcester, and the appellants executed them by sending the spirits from Worcester. In other words, the appellants by their agent Dredge sold spirits by retail, at 54A, Winchcomb Street, Cheltenham.

We are of opinion that upon those facts the justices were justified in convicting the appellants.

We think that if a person takes a house, or part of a house, either in his own name or the name of any other person, and there, either personally or by his agent, makes sales of spirits by retail, he carries on business there as a retailer of spirits, notwithstanding he keeps no spirits there, and the spirits which he sells there are (as in the present case) kept in and delivered from a store in another town, where he has a store and carries on the business of a wine and spirit merchant.

Judgment must be given for the respondent, and the appeal is dismissed with costs.

Judgment for the respondent.

Solicitors for appellants: *White & Sons.*
Solicitors for respondent: *Solicitors to the Treasury.*

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May 24.

SCHUSTER AND OTHERS *v.* FLETCHER.

Ship and Shipping—General Average—Special Charges—Remuneration to Shipowner for Services in transhipping and identifying Cargo, and arranging with Consignees for sale of part unidentified—Commission on Disbursements.

1 P.D. 131

A ship during her voyage from India to London was stranded on the coast of France. The shipowner despatched his manager and other persons to take part in the necessary salvage operations, and the whole of the cargo was saved, transhipped, and brought forward to London and the freight earned. Part of the cargo which could not be identified was sold by the shipowner by arrangement with the consignees through a broker, who received his brokerage. The shipowner incurred considerable trouble in chartering ships to carry on the cargo from France to London, and in sending out lighters and necessary appliances to France, and in the identification of the cargo, preparing for the sale, answering the inquiries of and arranging with the consignees. In the average statement a remuneration to the shipowner for "arranging for salvage operations, receiving cargo, meeting and arranging with consignees, and receiving and paying proceeds, and generally conducting the business," was charged partly to general average, and partly as particular average on the several interests rateably, the average stater thinking that the amount was a reasonable remuneration to the shipowner for his services and for commission on the sale of unidentified cargo, and on disbursements:—

Held, that under the circumstances the amount was improperly charged and could not be recovered, there being no contract on the part of the owners of the cargo to remunerate the shipowner for his services, a great part of which had been rendered with the object of earning his freight.

REPORT by a special referee under s. 56 of the Supreme Court of Judicature Act, 1873.

1. & 2. The plaintiffs are merchants in London. The defendant is sole owner of the ship *Victoria Nyanza*.

3. In December, 1873, the plaintiffs shipped on board the *Victoria Nyanza* at Calcutta, for delivery at London under bills of lading, 125 chests of indigo, and the ship sailed for London, having on board a valuable cargo of indigo, tea, jute, and linseed, the indigo being the most valuable portion.

4. On the 4th of April, 1874, the *Victoria Nyanza*, while prosecuting her voyage to London, stranded at Etaples, near Boulogne.

5. The defendant was at once informed by telegraph of the disaster, and he forthwith communicated by telegraph with

Messrs. G. H. Fletcher & Co., of Liverpool, a firm of which he had formerly been, but was not then, a member.

6. G. H. Fletcher & Co. at once communicated with the Liverpool Salvage Association, and obtained from that association the services of Captain Chisholm and Captain St. Croix, two gentlemen of experience in salvage operations who, on the 5th of April, started for Etaples.

7. G. H. Fletcher & Co. also, on the 6th of April, sent out their own manager, Mr. Bromehead, to the same place, and the defendant sent him a power of attorney to act for him, and opened a credit of 5000*l.* in his favour at Boulogne to provide for expenses there. The defendant also procured the necessary pumps, tackle, and other appliances to be sent out from England for the purpose of salvage operations.

8. Under the directions of Mr. Bromehead, with the assistance of Captains Chisholm and St. Croix, a part of the cargo was taken out of the ship as she lay stranded (an operation of considerable difficulty) and sent to Boulogne. On the 25th of April the ship was got off and towed into Boulogne Harbour, whence she ultimately sailed to Liverpool.

9. The whole of the cargo was saved and transhipped at Boulogne, and brought forward by the defendant to London, and the freight earned,

10. The first of the cargo reached London about ten days after the stranding, and the whole by the middle of May.

11. On the 25th of April, 1874, an average agreement was entered into between the defendant and the several consignees of cargo. The several consignees, in accordance with that agreement, paid sums of money to the defendant, the plaintiffs paying 1212*l.*

12. The cargo as it arrived was landed and warehoused at the London Docks.

13. Some portions of the cargo proved difficult of identification by reason of the shipping marks having become obliterated. Other parts it was impossible to identify. All the goods which were identified were given up to the consignees under the terms of the average agreement. The goods which were not identified were

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sold by the defendant by arrangement with the consignees thereof through a broker, who received his brokerage.

14. The defendant incurred considerable trouble in chartering ships to carry on the cargo from Boulogne to London, and in sending out lighters and necessary appliances to Boulogne, and in the identification of so much of the cargo as was identified, and in the endeavour to identify the residue, and in ascertaining and answering the inquiries of and arranging with the consignees, and in preparing for the sale of and selling the unidentified cargo and distributing the proceeds.

15. Mr. Elmslie, of the firm of Elmslie & Son, the average staters, mentioned in the average agreement hereinbefore mentioned prepared an average statement, dated the 16th of November, 1875.

16. In that statement, all disbursements by the defendant are included, and duly distributed among the several interests, including charges for the services of Captains Chisholm and St. Croix, and of the Liverpool Salvage Association, and of Mr. Bromehead, and the accounts paid to the dock company.

17. The statement also includes a charge as follows:—"G. H. Fletcher & Co. agency, arranging for salvage operations, receiving cargo, meeting and arranging with consignees, receiving and paying proceeds, and generally conducting the business, 2500*l*." This charge, the plaintiffs object to, and seek to recover back their proportion thereof.

18. The sum of 2500*l*. does not represent any sum which the defendant has paid, or rendered himself liable to pay, to G. H. Fletcher & Co. It was arrived at and distributed in the following manner. Mr. Elmslie formed the opinion upon all the circumstances of the case, that 2500*l*. was a reasonable remuneration to the defendant as shipowner, in respect of his services hereinbefore mentioned, and in respect of his advances for disbursements. And he proceeded to distribute that sum as follows. He took thereout a sum amounting to two and a half per cent. on the proceeds of the unidentified goods sold, and debited this to cargo in the cargo column. He took thereout further, a sum amounting to two and a half per cent. upon the total disbursements, and this he debited

to the several interests rateably, in their respective columns. The balance of the 2500*l.* he debited to general average, in the general average column.

19. The effect is, that the sum of 2500*l.* thus distributed, is made up of three heads of charge—

1. A commission on the sale of unidentified cargo.
2. A commission on disbursements.
3. A charge, by way of remuneration for trouble, in respect of the matters mentioned in paragraph 14.

20. There was no contract on the part of the consignees, or any of them, to pay the defendant the remuneration claimed, or any part thereof, under any of the heads above-mentioned, unless such a contract is to be found in the average agreement above-mentioned.

21. No custom has been proved, entitling a shipowner under such circumstances, to any remuneration under any of those heads. But a charge for remuneration by shipowner in respect of his trouble and labour in such cases, has, for the last few years, been often inserted in average statements and with increasing frequency. The charge has often been allowed, and sometimes resisted, by underwriters.

22. Where unidentified goods have to be sold, and the sale is managed not by the shipowner himself, but by the ship broker or some third person, a commission to such person (in addition to the selling broker's brokerage) is charged and allowed.

23. Where money for disbursements upon salvage of cargo is provided not by cargo owner or shipowner, but by some third person, commission upon such disbursements is charged and allowed.

24. Where in case of wreck, the shipowner abandons the voyage and the Salvage Association of London, Liverpool, or elsewhere, intervenes and salves the cargo, a sum by way of remuneration under the name of office charges, in addition to disbursements, analogous to the third head of charge in the present case, is always charged by and allowed to the association.

25. With reference to the first head of claim—If the defendant is entitled in point of law, to charge a commission on the sale of unidentified goods, the commission of two and a half per cent.

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charged, being an ordinary merchant's commission, is not an unreasonable commission to charge.

26. With reference to the second head of charge, the defendant was never out of pocket throughout the transactions hereinbefore mentioned, to any large amount, or for any considerable length of time, and unless he be entitled by reason of any general rule to charge a commission on disbursements, there are no special circumstances in the present case, making it reasonable to do so in this instance.

27. With reference to the third head of charge, if the defendant is entitled in point of law to remuneration for his trouble in and about the matters hereinbefore mentioned, a sum of 200*l.* is a reasonable remuneration in respect thereof.

The agreement was annexed to the case. It was between the defendant and the plaintiffs and other consignees, and recited that it was alleged by the defendant that the ship whilst in the prosecution of a voyage from Calcutta to London, with a general cargo of indigo, jute, and other produce, was by perils and accidents of the seas stranded on the French coast, about twenty miles south of Boulogne, and that steps were at once taken by the master and the owner of the ship for the safety and preservation of the ship and cargo, and a large portion of the cargo was discharged from the ship and landed, and the same had since been forwarded to London by the defendant, and other large portions of the cargo had been saved and had arrived in London or elsewhere in England either in the ship or otherwise. And the defendant alleged that he had paid and expended or had become liable to pay and expend large sums of money and had incurred great expenses and made certain sacrifices in and about the saving and preservation of the ship and cargo and the forwarding of the same cargo to London and otherwise in consequence of the stranding, and that part of such sums of money, expenses, and sacrifices, would be a charge upon the cargo, and that other portion thereof would be a charge on the ship or on the freight of the goods, and that other portion thereof would be a charge in the nature of general average on the ship, her cargo, and freight. And that the said sums of money, expenses, sacrifices, and damages could not yet be ascertained and adjusted, and the respective amounts and contributions due from

the respective owners or consignees of goods by the ship in respect thereof could not yet be ascertained. And that the consignees had respectively applied to the defendant for delivery of the goods consigned to them respectively by the vessel, or of which they are respectively authorized to claim and take delivery as aforesaid, and the defendant had agreed to deliver the goods to them respectively, on the freight due thereon being duly paid or secured to him and upon receiving such payment on account of and security for the amounts and contributions which might be due from or in respect of the goods for general average or charges or otherwise, on account of the sums of money and expenses expended or incurred by the defendant, or on account of the sacrifices and damages as hereinbefore mentioned. And that the consignees, in consideration of the delivery of their goods in manner aforesaid, had respectively agreed to pay and had paid to the defendant on account of the amounts and contributions due from or in respect of their goods the sums of money respectively set against their signatures, and the receipt whereof was acknowledged, and they had also respectively agreed to sign the undertaking hereinafter contained. And it was witnessed that for the consideration aforesaid the consignees did respectively promise and agree to and with the defendant that they would as soon as conveniently might be, and within a reasonable time after the date of the agreement, respectively give to the defendant, or his agents, true and correct particulars of the goods which should be so delivered to them respectively as aforesaid, and of the value of such goods, for the purpose of the adjustment of the general average and charges thereon. And further, that when and so soon as the said sums of money, expenses, sacrifices, and damages should have been duly adjusted, and the respective amounts or proportion due to the defendant from or in respect of the goods so delivered to them respectively, whether for general average or charges, or otherwise on account of the said sums of money and expenses expended or incurred by the defendant as aforesaid, or on account of such sacrifices or damage to the ship or goods as aforesaid had been duly ascertained, they would respectively pay to the defendant the amount or proportion so due in respect of their goods, after deducting therefrom the amount so paid by them on account

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as aforesaid, and for the considerations aforesaid the defendant promised and agreed to and with the consignees respectively that he should and would use all reasonable diligence to cause the said sum of money expenses and damages to be ascertained and adjusted, and the amounts and contributions due from the consignees respectively in respect thereof to be ascertained according to law, and that in case the amount so paid to him on account of the said consignees, or any or either of them, should, on the final adjustment, appear to exceed the amount due from such consignees or consignee respectively to the defendant, should and would forthwith return the balance or excess to such consignees or consignee respectively.

J. C. Mathew (*Hollams* with him), for the plaintiffs. The claim of the defendant is wholly unfounded, for it is opposed to the leading principles of general average, and the case discloses nothing in the nature of a custom or special agreement to support it. The services relied upon are stated in paragraph 14, and shew that there was no sacrifice for the benefit of the cargo. Every one of the consignees would have a right of action against the shipowner if he did not act with all the care in his power in conveying the cargo to its place of destination. There is nothing to explain the allowance of 2½ per cent. on the proceeds of the unidentified goods. The fact that there has been for several years a growing tendency on the part of shipowners to put forward claims like the present, makes it important that the law should be declared by the Court, but the facts present no novelty whatever.

J. A. McLeod, for the defendant. The charges which the defendant claims are reasonable. By taking more than ordinary trouble for the protection of the cargo, he prevented it from falling into the hands of local salvors, which would have caused the consignees to incur great expense. The defendant was not bound to take the trouble which he took with respect to the unidentified goods. Upon the consignee failing to indentify them, and therefore to enter and take delivery of them within the meaning of the Merchant Shipping Act, 1862, 25 & 26 Vict. c. 63, s. 67, he was at liberty, under the powers conferred by that and the subsequent sections, to himself land and enter the goods, and to retain his lien on the freight.

[COCKBURN, C.J. The answer to that is that he chose to take a different course.]

The plaintiffs made no objection to the course adopted by the defendant, and ought not to benefit by the extra trouble without making any return. Secondly, the defendant claims under the average agreement, which gives him larger rights than he would have by the ordinary mercantile law.

J. C. Mathew, in reply. The average agreement is in the ordinary form, and cannot support a claim for services which were not contemplated when it was made.

COCKBURN, C.J. I am of opinion that our judgment must be for the plaintiffs and against the shipowner, for the charge is one which cannot be supported. It divides itself into two heads,—one for getting the ship away from the place where she stranded, and the other for trouble taken in transhipping the cargo, identifying part of it, and arranging for the sale of another part which could not be identified. I think these services have nothing in common with general average. General average presupposes some sacrifice for the benefit of the whole adventure, which must be borne equally by all. Here the shipowner had an interest in getting the ship off and bringing the cargo into port, in order that he might earn his freight. He cannot be allowed to throw the whole cost of these proceedings upon those who to some extent share in the benefit from them. A great deal of what he has done was in the performance of his own contract. He was bound to use every effort to convey the cargo safely to its destination, and could only give up the task when it was hopeless. It cannot be said that the task was hopeless, when he was able at the cost of some trouble to bring the cargo into port. As to the expense incurred in respect of the articles which were identified, it was incurred for his own benefit, for unless he had delivered the goods to the proper owner he would not have obtained his freight. And as to those unidentified, he took no further trouble, but sold them through a broker who received his brokerage. In every respect, therefore, the charges cannot be supported.

MELLOR, J. I am of the same opinion on both points. Mr.

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McLeod has argued that the consignees stood by while the shipowner was taking extraordinary trouble, and ought therefore to recompense him for it. But the defendant was really doing nothing more than his own interests required him to do. I also think that the agreement affords no countenance for the present claim.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendant: *Waltons, Bubb, & Walton.*

May 11.

[CROWN CASES RESERVED.]

THE QUEEN *v.* WELLINGS.

Evidence—Deposition of Witness—Practice—Criminal Law—Statute 11 & 12 *Vict. c.* 42, *s.* 17.

Pregnancy may create an "illness" within the meaning of 11 & 12 Vict. c. 42, s. 17, so as to give the presiding judge discretionary power to admit in evidence upon a criminal trial the deposition of a witness, duly taken, who owing to pregnancy is proved to be unable to travel.

CASE stated by the chairman of the Worcestershire Quarter Sessions.

Thomas Wellings was indicted and tried for unlawfully assaulting one Ann Pugh, with intent her feloniously to ravish and carnally know.

Counsel for the prosecution applied to put in evidence the deposition of Ann Pugh, the principal witness.

In support of this application the husband of Ann Pugh was called, who proved that he resided with his wife at a place fifteen miles distant from the place of trial, and that when he left his wife on that morning she was unable to move about without considerable difficulty, that she was then lying down, and had been so during the greater part of the past week, though able to get up for a few minutes at intervals. The husband further stated, that his wife thought her confinement might not take place until the middle of the following week, but might, she also thought, occur at any hour.

No medical evidence was tendered.

Counsel for the prisoner objected that this was not such an illness as was contemplated by the statute 11 & 12 Vict. c. 42, s. 17. (1)

The Court, however, ruled that the deposition might be received in evidence.

It was accordingly put in, and the prisoner was convicted.

The question for the opinion of this Court was whether such deposition was rightly received in evidence.

Selfe, for the prisoner. The case shews that nothing except pregnancy operated to prevent the deponent from attending at the trial. Pregnancy is not an illness or disease, but a natural condition; therefore, although the witness may have been in fact unable to travel, such inability is not within the statute 11 & 12 Vict. c. 42, s. 17, and the deposition should have been rejected. Willes, J., in *Reg.* v. *Walker* (2), is reported to have said, "illness from confinement is an ordinary state, and not such an illness as is contemplated by the statute." *Reg.* v. *Wilton* (3) is almost to the same effect. In Archbold's Criminal Cases, 18th ed. at p. 267 a case is cited of *Reg.* v. *Parker and Ashworth*, in which Mellor, J., is reported to have ruled that pregnancy alone was not such an illness as was contemplated by the statute. The case of *Reg.* v. *Stephenson* (4) is not an authority to the contrary, because in that case the deponent was not merely pregnant, but was "otherwise poorly."

Godson, who appeared in support of the conviction, was stopped by the Court.

(1) ". . . . if upon the trial of the person so accused . . . . it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

(2) 1 F. & F. 534.

(3) 1 F. & F. 309.

(4) L. & C. 165; 31 L. J. (M.C.) 147; 9 Cox C. C. 156; 8 Jur. (N.S.) 522; 6 L. T. (N.S.) 334.

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LORD COLERIDGE, C.J. We all think that this conviction should be affirmed. Pregnancy may be a source of such illness as to render the witness unable to travel, and be an illness within the statute. It is in each case a matter for the presiding judge to determine. The presiding judge has in this case decided that the evidence was sufficient to satisfy him that the deponent was "so ill as not to be able to travel," and we see nothing to lead us to the conclusion that he was wrong.

MELLOR, and LUSH, JJ., CLEASBY, B., and GROVE, J., concurred.

Conviction affirmed.

Solicitors for prosecution: *Hunt & Sons, for Corbett & Co., Kidderminster.*

Solicitor for prisoner: *Lambert, Worcester.*

Jan. 28.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF J. B. SAUNDERS *v.* THE POSTMASTER-GENERAL.

Telegraph Act, 1868 (31 & 32 *Vict. c.* 110), *s.* 8, *sub-s.* 7—*Compensation for loss of Office—Annual Emolument—Allowance for Travelling Expenses.*

14 Ch D 314

The Telegraph Act, 1868 (31 & 32 Vict. c. 110), enables the Postmaster-General to purchase the undertakings of telegraph companies. By s. 8, sub-s. 7, every officer and clerk of any company, the undertaking of which may be so purchased, who has been not less than five years in the service of the telegraph companies and in the receipt of a yearly salary, or who has been not less than seven years in the service of telegraph companies and is in receipt of remuneration at a rate of not less than 50*l.* a year, shall, if he receives no offer of an appointment by the Postmaster-General in the telegraphic department, &c., receive during his life from the Postmaster-General by way of compensation for the loss of his office from the time at which the government takes possession of the company's telegraph, an annuity payable half yearly, equal, if he shall have been in the service of telegraph companies twenty years, to two-thirds of the annual emolument derived by him from his office on the 24th of June, 1868.

Mandamus to the Postmaster-General to assess compensation to S., an officer of a telegraph company, in respect of the expenses allowed him as a part of the emolument of his office. Return that it was the duty of S. from time to time, when required, to travel upon the company's business, and that the company had agreed with him upon rates of allowance, as an indemnity against the extra personal expenditure incurred, or assumed to be incurred, by him while travelling on the business of the company, beyond his ordinary expenditure, namely, 12*s.* 6*d.*

for twenty-four hours' absence from headquarters, and 5*s.* for twelve hours' like absence, when such last-mentioned absence did not oblige him to stop away from home, and that the allowances so made did not form any part of his yearly salary or remuneration, but were made for the purpose of indemnifying him against extra personal expenditure, and that the refusal to assess compensation was only so far as regarded these allowances. Plea, that the allowances were not made as an indemnity, but were made to the company's officers when travelling, whether extra expense was incurred by them or not, and were fixed payments; that the company's officers when travelling received the allowances, and saved a large part of the money which they would otherwise have expended at home for board and lodging, and that the allowances were part of the annual emoluments of the officers:—

Held, on demurrer, affirming the judgment of the Queen's Bench Division, that anything which S.'s allowance enabled him to save from his ordinary expenses was an "emolument," and therefore a subject for compensation.

APPEAL against the judgment of the Queen's Bench Division, in favour of the prosecutor on demurrer to a plea to a return to a mandamus. (1)

The pleadings sufficiently appear from the headnote.

Gorst, Q.C. (*Casserley* with him), for the defendant. There are two points for argument. First, the mandamus commands the Postmaster-General to assess the compensation due to the prosecutor. The Postmaster-General has no authority under the Act (31 & 32 Vict. c. 110) to assess any compensation to the officers and clerks of a telegraph company, and he is not bound to do so: further, there is no machinery provided by the Act by which he could assess compensation. The mandamus is therefore bad.

[BRAMWELL, L.J. If the Court hold that the mandamus is bad on that ground, the consequence will be that the prosecutor will have to begin de novo. The mandamus will have to state that the emolument is so much, and that the Postmaster-General has not paid compensation in respect of it.]

Gorst, Q.C., intimated that the Postmaster-General did not desire to put the parties to unnecessary expense, and withdrew the objection.

Secondly, the prosecutor on losing his office has not been deprived of an "emolument" within the meaning of s. 8, sub-s. 7, of 31 & 32 Vict. c. 110. The words "yearly salary" and the "rate of remuneration" in that section have the same meaning.

(1) 1 Q. B. D. 658.

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The allowance for travelling does not form part of either, and compensation is to be given only for a loss of salary or rate of remuneration. No compensation is provided for a loss in respect of expenses incurred in travelling.

Sir H. James, Q.C., and *A. Charles, Q.C.*, for the prosecutor, were not heard.

BRAMWELL, L.J. I must say I think that the Postmaster-General has behaved very liberally in refraining to press a technical objection to this mandamus, and although I feel a reluctance to give judgment upon a matter which does not come before the Court in a proper form, yet for the purpose of saving expense I will in the present case do so as our opinion has been invited.

I think this a very plain case. The object of the statute was to indemnify a man against—I cannot use a more comprehensive word—the loss of the emoluments he got out of his office, if he is a person whose remuneration brings him within the Act of Parliament. Then what is his annual emolument? A portion of it is what he can save out of the allowances made to him during the time he is absent from home. The legislature could not have used a word more comprehensive, and the reasonable construction of the statute requires us to extend it to a case like the present. What is the office worth to the prosecutor? It is worth so much in salary and so much profit out of the allowances, made not surreptitiously or wrongly. I would illustrate my meaning thus. Suppose a man's salary is 400*l.*, and out of that he would have to pay his travelling expenses, he would not be entitled to say his emolument is 400*l.* a year, because from that sum he must deduct his expenses. I do not agree with the argument that the prosecutor ought to be put in the position as if he had been wrongfully dismissed, that is not his position; for had he been wrongfully dismissed and brought an action, and his case was that he was engaged by the year, and therefore had lost the power of earning 400*l.*, and these incidents; the answer would be that the telegraph company were not bound to send him travelling on their business, it was a matter entirely at their option. And if, therefore, the words of the statute had been "emoluments which the prosecutor would have been entitled to make in future," there might have been some ground for the argu-

ment, but the words are "annual emoluments derived," that is actually derived from the office on the 24th of June, 1868.

I think the intention of the legislature is clear, and the word "emolument" is most comprehensive. The prosecutor is therefore entitled to have the judgment below affirmed.

BRETT, L.J. The contention in the Court below was upon the construction of the statute, and the judgment was against the Postmaster-General. The appeal is on the ground that that judgment was erroneous; we ought therefore to treat the appeal as if the question before us was the true construction of the Act of Parliament.

I think that what the prosecutor would be entitled to be paid is an annuity, neither in respect of his salary nor his remuneration, but in respect of his emolument, and by this is meant that which in another part of the statute is called "the value of his appointment," and it seems to me that these words give the construction to "emoluments." We have first to inquire whether a person in a telegraph office, receiving a salary or a remuneration or both, has been offered an appointment equal in value to the appointment which he had before the passing of the Act; and if he has had no such offer then he is to receive an annuity —it is not stated by way of compensation or in what respect,— but he is to receive an annuity equal to two-thirds of the annual emolument. That annual emolument is the value of his appointment. If a person only receives a salary, what is the value of his appointment? If there is nothing to be added to the salary or deducted from it, the value of the appointment is the salary; but if the salary is subject to his finding certain materials, it would be impossible to say that the salary is the proper measure of the value of the appointment or of his emolument. The emolument would be the amount of the salary, less the cost of the materials he had to supply. Then if he receives a salary and something additional by way of remuneration, the value of the appointment or of the emolument must be the salary and anything which he gains by the remuneration. In the present case the prosecutor has a salary that is taken into account admittedly without deduction; and he has an allowance of 12*s.* 6*d.* a day when he travels,

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and when he does travel, it is obvious that he saves the expense of his living at home. I should say that what he is entitled to in the way of emolument upon that is the difference between what he spends abroad and what he saves out of his expenses at home with his 12*s.* 6*d.* a day: his annuity ought to be two-thirds of such sum.

COTTON, L.J. The substantive question for our decision is whether or no the allowance for travelling expenses is to be taken into account, in estimating the annual emolument derived from the office held by the prosecutor. I am of opinion that the profit the prosecutor makes by reason of the saving he effects from the allowances must be taken into consideration in ascertaining that which is given as a standard, "the annual emolument derived by him from his office."

Judgment affirmed.

Solicitors for prosecution: *R. W. Childs & Batten, for John Taunton, Taunton.*

Solicitor for defendant: *W. H. Ashurst.*

May 17.

EASTLAND *v.* BURCHELL AND WIFE.

Husband and Wife—Separation—Authority to pledge Husband's Credit.

5 C P D 312
6 App Ca 30

Where husband and wife separate by mutual consent, the wife making her own terms as to her income, and that income proves insufficient for her support, the wife has no authority to pledge her husband's credit.

Defendants, husband and wife, executed a deed of separation, by the terms of which the wife retained the income of property settled to her separate use on marriage. The husband covenanted to pay her 20*l.* a year towards the maintenance of three of the children of the marriage, and the wife covenanted to maintain these children until they were twenty-one, and not to apply for further assistance to her husband. The husband had kept up the annual payments of 20*l.* in accordance with the terms of the deed. Plaintiff sued defendants in the county court to recover the price of meat supplied to the wife after the separation, and the judge at the trial, on hearing the wife's evidence, found that her income was insufficient for her support, and ruled that she had authority to pledge her husband's credit for the price of the meat. On appeal:—

Held, that this ruling was wrong, and that the wife, after the separation, had no implied authority to pledge her husband's credit.

APPEAL from the Tonbridge county court upon a case stated for the opinion of the Queen's Bench Division.

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The action was to recover from the defendants, who were husband and wife, the price of some butcher's meat supplied to the wife whilst living apart from her husband. The case was heard before the county court judge, without a jury, and he gave judgment for the plaintiff against the husband for the amount claimed.

The husband appealed.

The material facts set out in the special case, and the proceedings at the hearing in the county court, are fully stated in the judgment.

May 8. *Watkin Williams, Q.C.*, for the defendant. There are two questions in the case: first, whether the judge was right in ruling that, if the wife's income was insufficient to support her, she could pledge the husband's credit; and, secondly, whether he was right in rejecting the evidence of the defendant's advocate who proposed to prove the defendant's income and position.

As to the first question, a wife can only bind her husband as his agent, and her authority to pledge his credit ceases when the agency is at an end. Where there is a separation by mutual agreement, the wife making her own bargain, she is no longer the husband's agent, and her authority to bind him ceases.

The onus of shewing that the wife had authority to bind her husband lies on the person seeking to charge him with her debts: *Jolly* v. *Rees.* (1)

[He also referred to Smith's Leading Cases, vol. ii., 7th ed. p. 486 (note to *Manby* v. *Scott*), and cases there cited.]

As to the second question, *Cobbett* v. *Hudson* (2) shews conclusively that an advocate may give evidence in the cause he is conducting.

D. Kingsford, for the plaintiff. On the first question the authorities are clear that where husband and wife have separated by mutual consent, and an income has been allowed to the wife, the adequacy of that income is a question for the jury, and if it is found to be inadequate an authority to pledge the husband's credit may be implied. By separation a primâ facie presumption

(1) 15 C. B. (N.S.) 628; 33 L. J. (C.P.) 177.

(2) 1 E. & B. 11; 22 L. J. (Q.B.) 11.

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is raised that the authority to pledge the husband's credit is revoked, but that presumption may be rebutted by evidence. Here the inadequacy of the wife's income has been proved as a fact against the defendant. The principle is correctly stated in Addison on Contracts, 7th ed. p. 135, and Bullen and Leake's Precedents of Pleading, 3rd ed. p. 172.

[He also cited *Hodgkinson* v. *Fletcher* (1); *Hunt* v. *De Blaquiere* (2); *Nurse* v. *Craig* (3); *Johnston* v. *Sumner* (4); *Biffin* v. *Bignell* (5); *Beale* v. *Arabin.* (6)]

As to the second point, the county court judge rightly rejected the evidence of the defendant's advocate, on the ground that it must of necessity be hearsay.

Watkin Williams, Q.C., in reply.

Cur. adv. vult.

May 17. The judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J. The questions arising in this appeal are: 1st, whether the defendant is liable for butcher's meat supplied to his wife between the 13th of March and the 3rd of October, 1877, under the circumstances stated in the case; and, 2ndly, whether the county court judge was right in excluding the evidence of his solicitor, who tendered himself to prove from his personal knowledge what the exact income of the defendant was; the ground of rejection being, that the solicitor was acting as advocate for him in the cause, and that he could only give hearsay evidence.

The defendant and his wife were married in 1850. On the 6th of January, 1876, they separated by mutual consent, the defendant taking charge of the four elder children, the three younger ones remaining with his wife. By their marriage settlement all the property then belonging to the wife, together with the property which would come to her on the death of her mother, was settled to her separate use. A deed of separation was executed, by which she was to take and enjoy all articles of personal ornament and dress, and all property and income to which she then was, or

(1) 4 Campb. 70.
(2) 5 Bing. 550.
(3) 2 B. & P. (N.R.) 148.
(4) 3 H. & N. 261; 27 L. J. (Ex.) 341.
(5) 7 H. & N. 877; 31 L. J. (Ex.) 189.
(6) 36 L. T. Rep. 249.

should thereafter become possessed or entitled, and the savings of all income. The defendant covenanted to pay to the trustee 5*l.* a quarter so long as the three children, or any of them, should be under the age of twenty-one years, and continued to reside with her. The wife covenanted that she would maintain and educate the children out of her separate income and the 5*l.* per quarter, and not apply to the defendant for any further pecuniary assistance, and the trustee covenanted to indemnify him from all debts and liabilities thereafter to be contracted by the wife.

The parties continued to live separate under this arrangement, and the defendant had paid the 5*l.* per quarter up to a period subsequent to the accruing of the debt in question.

The plaintiff had never known the defendant, and had only dealt with the wife subsequently to the deed of separation. He supplied the goods supposing her to be a married woman, but without making any inquiries in the matter. The only evidence on which the learned judge acted was that of the wife (it being admitted that the goods had been supplied), and she stated that she had been ever since the separation, in receipt of her separate income, which brought in 297*l.* 15*s.* 2*d.* per annum, and the 20*l.* a year paid by the defendant; and that she found such income insufficient to enable her to maintain herself and such of her children as resided with her, and to educate them. The case states that she also gave evidence as to the position and income of the defendant prior to her separation, but does not state what that position and income were.

The learned judge decided upon this evidence, that the income of the wife was insufficient for the maintenance and education of herself and the children under her care, and thereupon held as a matter of law, that she had authority to pledge her husband's credit, and did pledge it to the plaintiff in respect of the meat supplied to her.

We are of opinion that this ruling is erroneous. The authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority. If she binds him, she binds him only as his agent. This is a well established doctrine. If she leaves him without cause and without consent, she carries no implied authority with her, to maintain herself at his expense. But if he wrongfully

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compels her to leave his home, he is bound to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means and position, the sufficiency of any allowance which he makes under these circumstances, is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may make their own terms; and so long as they continue the separation, these terms are binding on both. Where the terms are, as in this case, that the wife shall receive a specified income for her maintenance, and shall not apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express term of the arrangement. It is obviously immaterial whether the income is derived from the wife's separate property or from the allowance of the husband, or partly from one source and partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given. And it seems superfluous to add, that no third person can claim to disturb the arrangement made between the husband and the wife, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife could have claimed, that is, the stipulated allowance. He can derive no authority from the wife which she is incompetent to give. We are therefore of opinion that any inquiry into the husband's means was irrelevant, and for that reason we abstain from saying more upon the second question than that, if evidence upon that point had been relevant, we see no reason why the evidence should be rejected.

We do not think it necessary to go through the various cases cited. They are no guide to us except so far as they exhibit the principle on which the authority of a wife to pledge the credit of her husband rests. Upon that point they are conclusive to shew that the capacity of a wife to contract debts upon the credit of her husband is derived from an authority either expressly or impliedly given by him.

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We need only refer to the two more recent cases of *Johnston* v. *Sumner* (1), and *Biffin* v. *Bignell.* (2)

We are not concerned to inquire whether in this or that particular case this principle has been rightly applied. We have only to deal with the facts of this case, and applying the principle to them, we hold that the defendant is not liable for the debt contracted with the plaintiff.

Being satisfied that we have all the materials before us necessary for the determination of the question, it would be a useless expense to the parties to send the case back for a new trial.

We therefore act upon the wholesome provision of the Judicature Act, 1875, Order XL., Rule 10, and direct that the judgment for the plaintiff below, be set aside, and judgment be entered for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Price, Bigg, & Co.*
Solicitor for defendant: *Wilde.*

[IN THE COURT OF APPEAL.]

May 18.

LAING *v.* HOLLWAY AND ANOTHER.

Ship and Shipping—Charterparty, Construction of—Despatch Money for Time saved in loading and discharging Cargo.

A charterparty contained the following clause:—"Demurrage, if any, at the rate of 20s. per hour, except in case of any hands striking work, frosts or floods, revolution or wars, which may hinder the loading or discharge of the vessel. Despatch money 10s. per hour on any time saved in loading or for discharging." Four days were saved in loading and five days in discharging cargo, making together nine days, which if calculated at twenty-four hours a day would make 216 hours, or at twelve hours a day 108 hours:—

Held, by Baggallay, Bramwell, and Brett, L.JJ., reversing the judgment of the Queen's Bench Division, that "despatch money" was payable under the charterparty at the rate of 10s. per hour per day of twenty-four hours.

SPECIAL CASE stated by consent of parties and by order of the registrar of the Lord Mayor's Court of London, pursuant to ss. 6

(1) 3 H. & N. 261; 27 L. J. (Ex.) 341.

(2) 7 H. & N. 877; 31 L. J. (Ex.) 189.

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and 7 of the schedule to the Borough and Local Court of Records Act, 1872 (35 & 36 Vict. c. 86).

1. Action brought by the plaintiff, the owner of the ship *Good Hope*, to recover 54*l*., balance of freight alleged to be due to the plaintiff from the defendants.

2. On the 24th of March, 1876, a charterparty was entered into between the plaintiff and defendants at London, by which it was agreed that the steamship *Good Hope* should, after delivery of her outward cargo, proceed with all despatch to Elba and there load a cargo of ore, say about 1500 tons; and being so loaded should therewith proceed to the under-noted port, and there deliver the same as customary. . . . Freight to be paid at and after the following rate of 20 cwt. or 1015 kilos.: if destined to Newport, 11*s*. 9*d*. per ton; Cardiff, 11*s*.; Tyne, 11*s*.

"The cargo to be shipped at the rate 200 tons per running day (Sundays and holidays excepted) and to be discharged as fast as ship can deliver, not exceeding 200 tons per working day, weather permitting.

"The lay days to commence at 12 noon, after steamer is in berth, and in every respect ready to load or discharge respectively, and in free pratique. Charterers undertaking to provide an unoccupied berth on arrival of steamer, or time to count.

"Steamer to unload the barges sent alongside with all possible despatch (so long as this mode of shipment is continued), and any delay incurred by not doing so not to count as part of the lay days.

"Demurrage, if any, at the rate of 20*s*. per hour, except in case of any hands striking work, frosts or floods, revolution or wars, which may hinder the loading or discharge of the vessel. Despatch money 10*s*. per hour on any time saved in loading and for discharging.

"The captain to have an absolute lien on the cargo for all freight, dead freight, and demurrage due under this charterparty.

"The cargo to be brought to, and taken from alongside, the ship free of expense to the ship.

"The captain to employ charterers or consignees, or their nominees, at ports of loading and discharge for custom-house business on the usual terms, and failing to do so, the charterers,

or their agents, shall be at liberty to deduct 10 guineas when settling freight.

"There is no time clause under this charterparty, but the defendants to have the right of averaging days for loading and discharging in order to avoid demurrage, and steamers are to load and discharge by night as well as by day, and as rapidly as possible when required by shippers, consignees, or charterers.

"Ship to allow two days in loading in case of bad weather."

4. In pursuance of the charterparty the steamship *Good Hope* proceeded to Elba, and there loaded a full and complete cargo of ore (1), and then proceeded to Newport, and rightly and truly delivered the same pursuant to the charterparty, and thereupon the plaintiff was entitled to receive from the defendants the sum of 1061*l.* 19*s.* in respect of the freight earned by the carriage of the ore, being at and after the rate of 11*s.* 9*d.* per ton.

5. Four days were saved in loading at Elba and five days were saved in discharging at Newport, making together nine days, which if calculated at twenty-four hours a day would make 216 hours, or at twelve hours per day 108 hours.

6. Under the terms of the charterparty the defendants are entitled to despatch money at and after the rate of 10*s.* per hour on any time saved in loading or discharging.

7. The defendants have paid the freight so payable to the plaintiff with the exception of the sum of 108*l.* which they claim to deduct as despatch money, being at the rate of 10*s.* per hour of nine days of twenty-four hours.

8. The plaintiff admits that the defendants are entitled to despatch money for nine days, but contends that such despatch money is only payable at the rate of 10*s.* per hour per working day of twelve hours, and not of twenty-four hours as contended for by the defendants, and that therefore the defendants were only entitled to 54*l.* as such despatch money, and not to 108*l.* as claimed by them.

9. If the Court shall be of opinion that on the construction of

(1) The cargo shipped was 1800 tons. The number of lay days was not provided for in the charterparty, and could only be ascertained by dividing the 1800 tons of cargo by 200, the number of tons which the defendants as charterers were bound to ship per running day.

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the charterparty despatch money at the rate of 10*s.* per hour is to be paid per working day of twelve hours, the verdict shall be for the plaintiff for 54*l.*, with costs of this action; and if the Court shall be of opinion that despatch money at the rate of 10*s.* per hour is to be paid per day of twenty-four hours the verdict shall be for the defendants, with costs of the action.

Nov. 3, 1877. *Linklater*, for the defendants.
Hannen, for the plaintiff.

THE COURT (Mellor and Lush, JJ.) decided that the defendants were entitled to deduct despatch money at the rate of 10*s.* per hour for every working day of twelve hours only saved in loading and discharging the cargo, and gave judgment for the plaintiff.

The defendants appealed.

May 4. *Linklater*, for the defendants.
A. L. Smith, for the plaintiff.

Cur. adv. vult.

May 18. The judgment of the Court (Baggallay, Bramwell, and Brett, L.JJ.), was delivered by

BRAMWELL, L.J. We cannot agree with the judgment in this case. It seems founded on there being something in the charterparty by which days and their length can be ascertained and become of importance. We can find nothing to this effect: there is no such expression as lay day, and nothing which would ascertain how many hours would make a working day. Our law does not fix the number of hours in a working day, and certainly we have no statement what is its length at Elba. We think there is nothing by which time can be measured except hours. The charterers are to ship at the rate of 200 tons per running day, that is to say, at least that quantity unless hindered by strikes, &c., on which nothing turns; weather may excuse them to the extent of two days. But they may ship by night as well as by day, for so the steamer is bound to load; and the steamer is to unload barges sent alongside with all possible despatch. The charterers, therefore, may ship the whole twenty-four hours round, and ship no more than the 200 tons. The cargo is to be discharged as fast as the ship can deliver, not

exceeding 200 tons per working day, weather permitting. The working day here does not mean a day of any particular length, but working as opposed to a Sunday or a holiday. This means that the charterers are to unload at that rate, not that the ship is bound to discharge that quantity only. On the contrary, as in the case of the loading, the steamer is bound to "discharge by night and as rapidly as possible when required by shipper, consignee, or charterer." There is, therefore, no day of any length mentioned. There is a maximum of obligation on the charterer of 200 tons for loading and discharging on each working day, but the maximum of obligation on the ship to receive and discharge has no limit except "as rapidly as possible;" and the charterers have the whole twenty-four hours round in which they may unload the 200 tons. Then, what is the meaning of "time saved in loading or discharging?" The literal meaning we suppose would be doing those things in less time than they might be done in with ordinary despatch, i.e., if ordinary despatch with the ordinary number of hands and ordinary diligence would load and unload in twenty days or 240 hours, then extraordinary despatch,—extraordinary number of hands, and extraordinary diligence—in doing those things in fifteen days or 180 hours, the difference five days, or sixty hours, is time saved. Because, strictly speaking, time is not saved in doing a thing by working twenty-four hours round instead of twelve in one day and twelve another; twenty-four have been consumed in each case. Time is saved by getting from A to B if a man runs in one hour instead of walking in two. But nobody suggests that this is the meaning. It is admitted on both sides, and is clear, that "time saved" means if the ship is ready earlier than she would be if the charterers worked up to their maximum obligation only, all the time by which she is the sooner ready is time saved within the meaning of the charterparty. Then the question is by how much time is she sooner ready? The answer is in nine times twenty-four hours. Really the reason of the thing is that way. The owner would sail away by what has happened 216 hours sooner than he would have done, but for the defendants' despatch.

Suppose, that taking the maximum liability, the charterers had till and on a certain day, say Thursday, to load without incurring demurrage. Suppose they began at 6 A.M., and finished at mid-

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day, then they would at least have saved the rest of that day: let us call it seven hours. Now, suppose by working all Wednesday night and Thursday morning, the loading was finished at 6 A.M., they would have saved thirteen hours. Then, suppose they finished at 3 A.M., would they not have saved sixteen hours? and so if they finished on Wednesday at 7 P.M., they would have saved twenty-four hours. It was admitted by the plaintiff that the demurrage would be payable on this footing; then why not the despatch money? We think the judgment must be reversed.

Judgment reversed.

Solicitors for plaintiff: *Shum, Crossman, & Shum.*
Solicitors for defendants: *G. & W. Webb.*

May 20.

THE QUEEN *v.* THE GOVERNMENT STOCK INVESTMENT COMPANY, LIMITED.

Company—Poll, when duly demanded—"Holding Shares"—Holder of Proxies.

A company was registered under the Companies Act, 1862, with the following articles of association. Article 64: "Upon all questions at every meeting a shew of hands shall in the first instance be taken, and unless before or immediately upon such shew of hands a poll be duly demanded such question shall be decided by such shew of hands." Article 67: "If a poll is demanded by shareholders qualified to vote and holding in the aggregate 2000 shares or more, it shall be taken in such manner as the chairman shall direct, and the result of such poll shall be deemed to be the resolution of the company in general meeting." Article 75: "Votes may be given either personally or by proxy." Article 79: "Any instrument appointing a proxy shall be in the following form:—I—— .... hereby appoint —— .... to be my proxy at the —— general meeting of the company ..... and to vote for me and in my name upon all questions before such meeting." Two vacancies arose among the directors, and there were four candidates, of whom the prosecutor was one. At the meeting for election a shew of hands was taken, when the prosecutor obtained the largest number of votes. A poll was then demanded by the deputy chairman, who was the holder of twenty shares only, but who held proxies for more than 2000 shares. At the poll the prosecutor was not elected:—

Held, that a mandamus must be granted to admit the prosecutor as having been elected director by the shew of hands, for the poll was illegally demanded, as the holder of proxies was not a person holding shares within the meaning of article 67.

RULE calling on the defendant company to shew cause why a mandamus should not issue, commanding them to admit F. H.

Fowler as a director of the company in the place of Mr. G. Clerihew, or otherwise.

It appeared from the affidavits that the defendant company was registered under the Companies Act, 1862, and that in accordance with the articles of association, which required the two of the directors who had been longest in office to retire at each annual meeting, it was announced in the report of the directors that two of them, Mr. G. Clerihew and Mr. Andrew Macpherson, would retire at the meeting to be held on the 14th of February, 1878. At this meeting there were four candidates for the two vacancies, the two retiring directors, the prosecutor, and a Mr. Griffiths. Upon a shew of hands being taken under article 64 (1), the prosecutor obtained the largest number of votes, and was declared elected. A poll was then demanded by the deputy chairman, who was the holder of twenty shares only, but who held proxies for more than 2000 shares. No objection to the poll was made at the time, the prosecutor being ignorant of the law upon the subject, but after the poll he made a formal protest. The poll was fixed for the 21st of February, and at the close of the poll on the same day the two retiring directors were declared duly elected, the prosecutor receiving the next largest number of

(1) The following articles of association were brought before the Court by affidavit:—

64. Upon all questions at every meeting a show of hands shall in the first instance be taken, and unless before or immediately upon such shew of hands a poll be duly demanded, as hereinafter mentioned, such question shall be decided by the result of such shew of hands.

67. If a poll is demanded by shareholders qualified to vote and holding in the aggregate 2000 shares or more, it shall be taken in such manner as the chairman shall direct, and the result of such poll shall be deemed to be the resolution of the company in general meeting.

75. Votes may be given either personally or by proxy.

79. Any instrument appointing a proxy shall be on the proper stamp and in the following form, or such other form as the board may direct:—

"The 'Government Stock Investment Company, Limited.'

"I of in the county of , being a shareholder in the 'Government Stock Investment Company, Limited,' and entitled to vote in respect of , shares hereby appoint of to be my proxy at the [ordinary or extraordinary, as the case may be] general meeting of the company to be held on the day , or at any adjournment thereof, and to vote for me and in my name upon all questions before such meeting.

"As witness my hand this day of ."

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votes. He now claimed to have been elected by the shew of hands, on the ground that the poll was illegally demanded, as the holder of proxies was not by virtue of them entitled to demand a poll.

Cave, Q.C., and *Wood Hill*, shewed cause. First, the prosecutor ought to have made his objection at the time when the poll was demanded, and cannot, after taking his chance at the poll, be allowed to say that the whole proceeding was illegal. Secondly, a proxy is entitled under article 67 to demand a poll. A proxy is a person who acts generally as a substitute for another, and the form of proxy in the present case is in larger terms than that in Table A (51), for it appoints the proxy to vote not merely at the meeting but "upon all questions before such meeting."

Bray, in support of the rule. A shareholder whose qualification is made up by proxies cannot demand the poll within article 67. The article speaks of shareholders holding 2000 shares, and it cannot be construed as if the words were "holding personally or by proxy 2000 shares." The articles when they speak of shareholders "demanding" a poll, must mean that they are to demand it in person. Sect. 51 of the Act provides that resolutions shall be passed by a majority voting "in person or by proxy," unless a poll be demanded by at least five members, omitting the words "in person or by proxy." A proxy is only authorized to vote, he has no more power to demand a poll than he has to move a resolution. The shareholder demanding a poll must not merely represent the shares, he must actually hold them. The fact that the office is full is no objection to a mandamus: *Rex* v. *Bedford Level.* (1)

COCKBURN, C.J. It is not without considerable regret that I think that this rule must be made absolute. The gentleman on behalf of whom this application is made was no doubt, upon the shew of hands, declared elected, but upon a poll being demanded he received a smaller number of votes than two other of the candidates. But the construction which we feel compelled to put on article 67, reading it in connection with article 64, obliges us

(1) 6 East, 356.

to set aside the real election upon an objection which is purely technical. Article 64 directs that "upon all questions at every meeting a shew of hands shall in the first instance be taken, and unless before or immediately upon such shew of hands a poll be duly demanded as hereinafter mentioned, such question shall be decided by the result of such shew of hands." Then article 67 provides that if a poll is demanded by shareholders qualified to vote and holding in the aggregate 2000 shares or more, it shall be taken in such manner as the chairman shall direct. The poll must therefore be duly demanded, and the question is, was the poll duly demanded? I cannot but think that Mr. Bray is right in his contention that the poll ought to be demanded by the prescribed number of shareholders, and that they must be present and qualified to vote, and although the articles enable votes to be given either personally or by proxy, yet that a proxy has no power to demand a poll. The words in article 67, "if a poll is demanded by shareholders qualified to vote," must, I think, be read as if they were "shareholders themselves qualified to vote," for I think no one can be said to be "holding" shares within the meaning of this article when, instead of holding shares, he is holding the proxies of other persons who do hold them. The result, therefore, is that the rule must be made absolute, and the defendants may, if they please, allow the facts to be put on the record for the purpose of obtaining the opinion of the Court of Appeal.

MELLOR, J. I am of the same opinion. I thought at first that article 64 might be construed to mean that the objection to the demand of the poll must be taken immediately upon the demand; but I now think that such a construction is inadmissible, and that the poll is not properly demanded unless the demand is by shareholders qualified to vote and holding shares. If it had been intended to give proxies the power contended for, one would surely expect that the description would have stood "holding in the aggregate by themselves or by proxy 2000 shares or more." And as there seems to be ample authority for granting a mandamus, although the office is full, inasmuch as the office has been filled by votes which cannot be sustained, the rule must be

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made absolute, leaving the defendants at liberty, if they think fit, to raise the question upon the return.

Rule absolute.

Solicitors for prosecutor: *Hargrove & Co.*

Solicitors for defendants: *Carr, Bannister, & Co.*

June 24.

EX PARTE RAYNER.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 176, 179, 180—*Land compulsorily taken—Arbitration as to Disputed Compensation, Costs of—Lands Clauses Consolidation Acts*, 1845, 1869.

When land has been taken compulsorily by a local board under the powers of the Lands Clauses Consolidation Acts, incorporated by the Public Health Act, 1875, and an arbitration takes place to determine the amount of compensation to be paid to the owner of the land so taken, the procedure with regard to such arbitration and the right to costs are wholly governed by the provisions of the Lands Clauses Consolidation Acts, and not by those of the Public Health Act with regard to arbitrations under that Act.

IN this case the local board of Chelmsford had acquired powers to take land compulsorily under the provisions of the Lands Clauses Consolidation Acts, incorporated by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 176. By virtue of such powers they had taken certain land belonging to a Mr. Rayner compulsorily under the provisions of those Acts. The amount of compensation to be paid for such land being disputed, an arbitration took place between the parties to ascertain such amount, and the result of the arbitration was to fix the amount at a larger sum than the local board had offered Mr. Rayner, but the award was silent as to costs.

An application was made to a master on the part of Mr. Rayner to tax his costs of the arbitration under the Lands Clauses Consolidation Acts, on the ground that under those Acts the applicant was entitled to costs. The master refused, on the ground that the arbitration was one under s. 180 of the Public Health Act, 1875, the 13th sub-section of which provides that the costs of the arbitration shall be in the discretion of the arbitrator, and that consequently, the award being silent as to costs, the applicant was not entitled to them. A rule nisi had been obtained on behalf

of Mr. Rayner for a mandamus to the master directing him to tax the costs, against which

Tindal Atkinson shewed cause. This arbitration was under the Public Health Act, 1875. The incorporation of the Lands Clauses Acts into the Public Health Act by s. 176 is only for the purpose of giving the local authority the powers which relate to taking land compulsorily. This being an arbitration under the Public Health Act, 1875, therefore, by the express terms of s. 180, the provisions of that Act, so far as applicable, supersede those of the Lands Clauses Consolidation Act, 1875. The result is that, as the award was silent as to costs, the applicant is not entitled to them, and the master was therefore right in refusing to tax them.

Grantham, Q.C., and *A. P. Stone*, supported the rule. The provisions of s. 179 of the Public Health Act as to disputed compensation apply, "except where the mode of determining the same is specially provided for." Here the mode of determining the compensation is specially provided for. This is not an arbitration under the Public Health Act, 1875, but under the Lands Clauses Act, 1845. There are many matters arising under the Public Health Act as to which it is provided that there shall be compensation to the owners of property: see ss. 22, 52, 61, 155, and 308. It is to these matters that the provisions as to arbitration contained in ss. 179, 180 apply. The whole of the provisions of the Lands Clauses Acts are incorporated by s. 176, with certain specified exceptions, and therefore the sections of the Lands Clauses Act as to compensation must be read into the Act. It must have been the intention that the sections of the Lands Clauses Act relating to compensation should apply in the case of compulsory purchase of lands, and not those of the Public Health Act. It is not immaterial to observe that the Public Health Act incorporates the Lands Clauses Consolidation Act, 1869, which applies mainly to costs.

COCKBURN, C.J. The Lands Clauses Consolidation Acts, 1845, 1860, and 1869, are incorporated with the Public Health Act, 1875, by the 176th section of that Act, and a power is thereby

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given to local authorities, when the conditions of the Act have been complied with, of taking land compulsorily. If that provision had stood alone, there would have been no difficulty in the case, and it would have been quite clear that, if an owner, whose lands were compulsorily taken, adopted arbitration as the means of fixing the compensation to be paid him, the procedure with respect to such arbitration would have been entirely governed by the Lands Clauses Consolidation Acts. But the subsequent sections of the Public Health Act relating to arbitrations, viz., ss. 179 and 180 at first sight seemed to raise a difficulty, for the 180th section, "with respect to arbitrations under this Act," provides by sub-s. 13 that the costs shall be in the discretion of the arbitrator or umpire. But on further consideration the effect seems to be plain enough. There are many matters provided for by the Public Health Act, other than the compulsory taking of land, which may give rise to disputes as to compensation between owners of property and the local authority. The "arbitrations under this Act," to which the 179th and 180th sections apply appear to relate to these matters, and not to the settlement of disputes as to compensation for lands compulsorily taken, which is already provided for by the Lands Clauses Acts. Under the Lands Clauses Acts the applicant would be entitled to his costs to be ascertained by taxation, and therefore this rule must be made absolute.

Mellor, J., concurred.

Lush, J. I am of the same opinion. The arbitrator in this case awarded more than the sum that had been offered for compensation by the local authority, and consequently the applicant would, if the Land Clauses Acts apply, be entitled to his costs. The question is whether the provisions of the Lands Clauses Act as to costs do apply in the present case. The Public Health Act, s. 176, with respect to the purchase of lands incorporates all the provisions of the Lands Clauses Acts, except the provisions relating to access to the special Act, and s. 127 of the Lands Clauses Consolidation Act, 1845. This is a case of purchase of lands, and among those provisions are provisions as to the mode of determining the compensation to be given to the owner. According

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to these provisions it is to be settled by a jury or by arbitration, and in the latter case the costs are to be borne by the promoters, unless the arbitrator awards the same sum as has been offered for the lands by them or a less sum. The difficulty in this case arises from the provisions of the 179th and 180th sections of the Public Health Act. The words of the 179th section are however "in case of dispute as to the amount of any compensation to be made under the provisions of this Act, except where the mode of determining the same is specially provided for." If there had been no mode of settling disputes as to compensation under the Lands Clauses Acts, I think this provision would have applied, but there being a mode already provided by these Acts, I think it does not; and it follows that the provisions of s. 180 all refer to matters other than those provided for by the Lands Clauses Acts.

Rule absolute.

Solicitors for applicant: *Collyer-Bristow, Withers, & Russell.*
Solicitors for Local Board: *White, Renard, & Co.*

SANDYS, APPELLANT; SMALL, RESPONDENT.

June 26.

Sale of Food and Drugs Act (38 & 39 *Vict. c.* 63), *ss.* 6, 8—"*To the Prejudice of the Purchaser*"—*Notice posted up that Article sold is mixed.*

Where the seller of an article brings to the purchaser's knowledge the fact that the article sold to him is not of the nature, substance, or quality of the article he demands, the sale is not "to the prejudice of the purchaser," within the meaning of the 6th section of 38 & 39 Vict. c. 63, and consequently no offence is committed within that section.

The 8th section of the Act points out a mode of giving notice to the purchaser that is made by the statute sufficient, but it is not intended by that section that, whenever the mode therein specified is not adopted, there shall necessarily be an offence against the 6th section.

CASE stated by justices under 20 & 21 Vict. c. 43, the facts of which were in substance as follows:—

The appellant was an inspector of weights and measures of the county of Derby charged with the execution of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), and in such capacity had laid an information against the respondent for an offence

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under the 6th section of that Act. The justices dismissed the information. The respondent was a licensed victualler at Langley Mill, in the township of Heanor, in the county of Derby. The appellant and one Samuel Slack, his assistant, were together in the performance of their duties under the Act near the house of the respondent on the 13th of March last. Slack, acting under the appellant's directions, went into the house and stood at the bar window, and there asked the respondent's wife for half a pint of whiskey. The respondent's wife gave him half a pint of whiskey (for which he paid), placing it in a bottle which was produced by Slack, without making any observation as to its quality or putting a label on the bottle. It was admitted by the appellant that on subsequently going into the house he saw posted in the smoke room a notice as follows: "All spirits sold here are mixed—38 & 39 Vict. c. 63, sections 8 and 9." The said Samuel Slack denied seeing any notice at the moment when he bought the whiskey, although it was proved that a similar notice was posted in full view of persons purchasing at the bar window.

It was proved on behalf of the respondent that the notice referred to was placed in a conspicuous position in the smoke room, and it was also proved that similar notices were conspicuously placed in the bar and in every other room in the house ordinarily used by the respondent for the purpose of his business. The whiskey, when analysed, proved to be mixed with water and thirty degrees under proof.

It was contended on behalf of the respondent that the posting of the notice referred to, in the smoke room and bar and within view of persons purchasing at the bar window, was equivalent to a declaration on the part of the respondent to the purchaser that the whiskey sold was not of the nature, substance, and quality demanded by the purchaser. The appellant contended that the respondent should have placed a label on the bottle in which the whiskey was put, in accordance with s. 8 of the Act.

A copy of the above-mentioned notice was annexed to the case. It was a printed notice in large capital letters.

The question for the opinion of the Court was whether the posting of the notice as aforesaid was equivalent to a declaration by the respondent that the whiskey sold was not of the nature,

substance, and quality of the article demanded by the purchaser, and relieved him from the penalty. (1)

Wills, Q.C., for the appellant. The only way in which the seller of an article not of the nature, substance, and quality of the article demanded by the purchaser can protect himself is by giving a label to the purchaser in accordance with the 8th section.

[COCKBURN, C.J. Can it be said that the sale is "to the prejudice of the purchaser" when he knows that the article is mixed?]

It is contended that the sale is to the prejudice of the purchaser within the meaning of the 6th section, whenever he gets an inferior article to that which he demanded, whether he knows it or not.

[COCKBURN, C.J. That construction gives no substantial meaning to the words.]

If any other construction be given there is danger that the Act will be made a dead letter. If a label is delivered, the knowledge is clearly brought home to the purchaser, but if the question is open whether by any other means the purchaser knew that the article was mixed, doubts and disputes will arise as to whether the notice is brought home to him; there may be a conflict of testimony, and the protection intended to be given by the Act to the purchaser is much diminished. The case does not find that the purchaser had seen the notice at the time when he purchased.

[COCKBURN, C.J. It is found that the notice was conspicuously posted all over the house and in full view of customers at the bar window.]

It is submitted that the case should be sent back to the justices to find distinctly as to this question.

Mellor, Q.C., for the respondent. The intention of the Act is to prevent the purchaser from being prejudiced by getting an

(1) The case contained various other statements of fact, intended to raise questions as to whether the conditions of the Act had been complied with with regard to the preliminary steps required to be taken prior to the analysis of the article, and specific questions were submitted to the Court on these points. But it is unnecessary to set out the statements of the case as to these points, as the Court ultimately gave no judgment upon them.

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inferior article to that which he believes himself to be purchasing. It never could have been intended that, when the purchaser perfectly well knows what he is buying, the seller should be guilty of an offence within the Act.

Wills, Q.C., in reply (1).

COCKBURN, C.J. I am of opinion that our judgment should be for the respondent. I should be very sorry to diminish the efficacy of a very useful Act, intended to protect the public from frauds committed by the sellers of the articles to which the Act relates, but we ought, if possible, to construe the words of the Act so as not to interfere with due freedom of dealing between the seller and the purchaser, and not unfairly to prejudice either party. I think we should be doing so if we held its provisions to apply to cases such as the present, where both parties perfectly well know what they are dealing with. The provisions of the Act were intended to apply to adulterations of a clandestine character, which operate to the prejudice of the purchaser.

The provisions of the 6th section seem to me to apply to cases where a seller professes to sell to the purchaser an article as being of a certain denomination, whereas the article has been altered by an admixture of some other ingredient, and it seems that when the article is so altered, this must be considered to have been done "to the prejudice of the purchaser," unless it is duly and sufficiently brought to his knowledge; but if the alteration of the article, as of spirits by the admixture of water, is brought to the knowledge of the purchaser and he chooses to

(1) 38 & 39 Vict. c. 63, s. 6, provides, that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, or quality of the article demanded by such purchaser, under a penalty not exceeding 20*l*. The section then sets out certain excepted cases in which it shall not be deemed that an offence has been committed under the section.

Sect. 8 provides, that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health and not intended fraudulently to increase its bulk weight or measure or conceal its inferior quality, if at the time of delivering such article or drug, he shall supply to the person receiving the same a notice by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed.

purchase it notwithstanding, it can never have been intended that such a transaction should be interfered with. But, on the other hand, if the seller chooses to sell an article as of a certain denomination and the article is really mixed with foreign ingredients, it lies on him to shew that the purchaser knew what he was purchasing.

The statute in the 8th section provides a mode by which the seller may insure himself protection against the possibility of the enactment operating to his prejudice. If he delivers the label as provided by that section, he protects himself against all possibility of being charged with an offence under the Act. If he does not, then I think it is incumbent on him to prove that by some other means (with regard to which he will be subject to be met by counter proof) that the purchaser had notice what he was purchasing. If the seller can shew that he had such notice, then I think no offence will be committed, because the sale will not be "to the prejudice of the purchaser." I do not think that the statute means that the affixing of the label is to be the only mode of bringing knowledge home to the purchaser. I think, for instance, if a man puts up in a conspicuous position a notice in large letters, as was done here, and it is clear that it must have come under the observation of the customer, that the 6th section would not apply. Mr. Wills suggested that it was not clear in the present case that the purchaser had seen the notice when he purchased the whiskey, and that the case should go back that the facts may be stated more distinctly as to this. It is found that notices were posted up in all the rooms of the house in conspicuous places, so that customers could not fail to see them.

We are clear that under the circumstances there was no real offence against the provisions of the 6th section, and that being so, it seems to us that we should deal with the case as it stands, and that we ought not to send the case back for the purpose of giving an opportunity of proving that the particular individual who bought the whiskey for the purposes of this prosecution had not seen the notice. On the case as it stands, we think our judgment must be for the respondent.

MELLOR, J. I am of the same opinion. The statement of the

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facts is not very distinct as to whether the purchaser had an intimation by means of the notice that he was purchasing a mixture. It is left to us to draw the inference whether that was so or not, and, from the facts stated, I should rather infer that though the purchaser may not have seen the notice at the exact moment when he asked for the whiskey, yet that he might well have seen it directly afterwards, and before the transaction was completed by the payment of the money and his receipt of the article. With regard to the construction of the statute, I agree with my Lord that no offence was committed under the 6th section.

Decision of justices affirmed.

Solicitor for appellant: *Greenfield.*
Solicitor for respondent: *Warriner.*

July 2.

BEW, APPELLANT; HARSTON, RESPONDENT.

"*Gaming*"—*Game of Skill played for Money or Money's worth*—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 17, *sub-s.* 1—*Suffering Gaming on Licensed Premises.*

The appellant, a licensed person, suffered to be played on the licensed premises a game called puff and dart, the object in which is to hit a mark on a target with a small dart blown through a tube. The players each contributed 2*d.* as entrance money, the total sum so contributed being applied to the purchase of a rabbit as a prize for the winner of the game:—

Held (Cockburn, C.J., doubting), that the appellant was rightly convicted of suffering gaming on the licensed premises under 35 & 36 Vict. c. 94, s. 17, sub-s. 1.

CASE stated by the stipendiary magistrate for the Potteries, under 20 & 21 Vict. c. 43, the facts of which were in substance as follows:—

The appellant was convicted by the magistrate upon an information laid by the respondent of an offence under 35 & 36 Vict. c. 94, s. 17, sub-s. 1, which provides that if any licensed person "suffers any gaming or unlawful game to be carried on on his premises," he shall be liable to a penalty. The circumstances under which the appellant was convicted were as follows. He had

permitted certain persons on his licensed premises to play at a game called puff and dart. Each of the players contributed a sum of 2*d.* as entrance money, the sum so contributed being applied to the purchase of a dead rabbit, which formed the prize for which the game was played. The object in the game was to hit a mark on a target with a small dart blown through a tube.

The question was whether the appellant was rightly convicted.

June 1. *J. F. Clerk*, for the appellant. There is no definition of "gaming" in the Act. The mere fact that a game is played for money does not make it gaming. It is contended that "gaming" is a term which is only applicable to games of chance, or in which chance is a main element. Some assistance may be given by the various statutes passed at different times making games and gaming unlawful. The object of the early statutes of this description was the encouragement of archery, and therefore the character of the games against which those statutes were aimed would not afford a criterion as to the sort of games that would come within the term "gaming" in later times. All the games which are specially aimed at in later statutes are games in which chance is the principal element. If this game comes within the term "gaming," playing at pool for money, which is done constantly in licensed houses which have a billiard licence, would do so also. [He cited 33 Hen. 8, c. 9, s. 11; 16 Car. 2, c. 7; 9 Ann c. 14; 18 Geo. 2, c. 34; 8 & 9 Vict. 109; *Foot* v. *Baker*. (1)]

No counsel appeared for the respondent.

Cur. adv. vult.

July 2. MELLOR, J. The statute makes it a penal offence if any licensed person suffers gaming to be carried on on the licensed premises, and the question for us is, whether the appellant was guilty of this offence. I think myself that he was rightly convicted. It seems to me that the case falls within the authority of *Reg.* v. *Ashton* (2). Lord Campbell there says, "The object of the statute was to prevent the contracting of bad habits by the practice of games where money was staked in public

(1) 5 M. & G. 335. (2) 1 E. & B. 286.

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houses. If money was staked, that would be gaming." Here money was not in one sense staked on the game, but each man paid his twopence for the chance of winning the rabbit. It comes to the same thing in principle. I think it was gaming within the meaning of the Act, which seems to me to have been intended to prevent the contracting of bad habits by the practice of such games in public houses.

COCKBURN, C.J. I entertain serious doubts whether the view taken by the magistrate, and with which my learned Brother Mellor agrees, is correct. The Act speaks of gaming and unlawful games. Now this game does not come within the expression "unlawful games," for the expression refers to the games from time to time made unlawful by statute, of which this is not one. I am inclined to think that the term "gaming" implies something which in its nature depends on chance, or in which chance is an element. This game does not appear to be one of chance, but of skill, though the skill may not be of a very lofty character. The result of my differing from the conclusion of my Brother Mellor would be that the conviction would stand. I do not wish to be taken as expressing a very decided opinion as to whether a game of this description comes within the term "gaming." All I desire to say is, that I very much doubt whether it does. I do not regret the result, for I think that this game was within the mischief that the statute meant to guard against. In the result, therefore, the conviction must stand.

Conviction affirmed.

Solicitor for appellant: *Montagu, for Tennant.*

[IN THE COURT OF APPEAL.]

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May 18.

THE QUEEN ON THE PROSECUTION OF THE LONDON AND NORTH WESTERN RAILWAY COMPANY, APPELLANTS; THE OVERSEERS OF THE POOR OF THE TOWNSHIP OF THE FOREIGN OF WALSALL, AND OTHERS, RESPONDENTS.

Court of Appeal—Jurisdiction—Case stated by Quarter Sessions—Certiorari—"Judgment or Order"—"Appeal"—Supreme Court of Judicature Act, 1873, *ss.* 19, 45.

The Court of Appeal has no jurisdiction to entertain an appeal from a decision of the Queen's Bench Division upon a rule for quashing an order of Quarter Sessions as to the validity of a rate. (By Cockburn, C.J., and Brett, L.J.; Bramwell and Cotton, L.JJ., dissenting.)

APPEAL against the decision of the Queen's Bench Division in favour of the prosecutors, on an assessment for a borough-rate of the township of the Foreign of Walsall.

By a rule dated the 30th of April, 1877, and expressed to be made with the consent of counsel on both sides, it was ordered in the Queen's Bench Division that a writ of certiorari should issue, directed to the recorder of the borough of Walsall "to remove into this Divisional Court all and singular orders made by him upon the appeal of the London and North Western Railway Company, against a borough rate laid on that part of the Foreign of Walsall, which is situate within the municipal borough of Walsall, and which said rate bore date on or about the 1st day of December, 1876. At the instance of the overseers of the poor of the township of the Foreign of Walsall, in the county of Stafford, and the mayor, aldermen, and burgesses of the borough of Walsall." A writ of certiorari, dated the 1st day of May, was issued, in the terms of the rule above-mentioned, commanding the recorder of the borough to "send under your seal before us, in the Queen's Bench Division of the High Court of Justice, at Westminster, immediately all and singular the said orders, with all things touching the same, as fully and perfectly as they have been made by you, and now remain in your custody or power, together with this our writ, that we may cause further to be done thereon, what of right and according to the law and custom of England we shall see fit to be done."

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By a rule dated the 9th of May, it was ordered that "the 2nd day of June in the next Trinity sittings be peremptorily given to the prosecutors to shew cause why an order of sessions made upon the appeal," mentioned in the rule of the 30th of April, and in the certiorari, "should not be quashed for the insufficiency thereof."

By a rule dated the 24th of November, "upon hearing counsel on both sides, it was ordered that the rule made the 9th day of May last, that the prosecutors should shew cause why an order of sessions made upon the appeal," above-mentioned, "should not be quashed for the insufficiency thereof be now discharged, and the said order of sessions affirmed." The Queen's Bench Division gave leave to appeal, if an appeal would lie.

By a notice dated the 29th of November, the defendants gave notice that "her Majesty's Court of Appeal" would be moved on their behalf, "for an order that the judgment of the Queen's Bench Division of the High Court of Justice, delivered on Saturday, the 24th day of November instant . . . . be reversed, varied, or set aside."

Feb. 5. *Herschell, Q.C.*, and *Anstie*, for the defendants. A preliminary question has been raised on behalf of the prosecutors, whether this Court has any jurisdiction to entertain an appeal from the Queen's Bench Division, where a case has been stated by a court of quarter sessions as to the legality of a poor-rate or borough-rate. The jurisdiction of the Queen's Bench Division is the same whatever may be the nature of the rate in dispute, and this case may be dealt with as if it were an appeal from a poor-rate. By the Supreme Court of Judicature Act, 1873, ss. 19, 45, this Court has power to hear appeals of every description except in criminal cases, over which it has no jurisdiction, owing to the provisions contained in s. 47: *Reg.* v. *Steel* (1); *Reg.* v. *Fletcher* (2); here the matter in dispute relates to purely civil liability. It is true that this is not a case stated under 12 & 13 Vict. c. 45, s. 11, and that a certiorari is necessary to bring the proceedings at quarter sessions before the Queen's Bench Division; it may be argued for the prosecutors that the necessity for a

(1) 2 Q. B. D. 37. (2) 2 Q. B. D. 43.

certiorari shews that this is a criminal case; but it is clear from the judgment of the Court of Queen's Bench in *Reg.* v. *Sutton Coldfield* (1), that the certiorari is matter of machinery only. This Court has entertained an appeal in a case of quo warranto: *Reg.* v. *Collins* (2); and if it has jurisdiction to hear appeals of that kind, it is difficult to assign any reason why it should not hear appeals in respect of rates.

N. Neville (*F. A. Bosanquet* with him), for the prosecutors. The history of the procedure, under which a case is stated by a court of quarter sessions, is given in *Reg.* v. *Chantrell* (3), and it is plain from the decision therein, that by stating a case a court of quarter sessions merely asks for the opinion or advice of the Queen's Bench Division. The only jurisdiction, which that division has, is over the costs, 5 Geo. 2, c. 19, ss. 2, 3. The decision of the Queen's Bench Division in discharging the rule to quash the order of the sessions was not a "judgment or order" within the Supreme Court of Judicature Act, 1873, s. 19, and the hearing of this case in that division of the High Court was not an "appeal" within s. 45; and nothing in the Rules of the Supreme Court can assist the defendants, because by Order LXII. proceedings on the Crown side of the Queen's Bench Division are expressly excluded from their operation.

Herschell, Q.C., replied.

Cur. adv. vult.

May 18. The following judgments were delivered:—

COTTON, L.J. This is an appeal of the overseers of the poor of Walsall and of the corporation of Walsall against a rule of the Queen's Bench Division made the 24th of November, 1877, by which that Court discharged a rule nisi calling upon the London and North Western Railway Company to shew cause why an order of sessions therein referred to should not be quashed, and whereby it was ordered that the order of sessions be affirmed.

The first question, and the only one now to be considered, is whether this Court has any jurisdiction to entertain the appeal; and, with all respect for the judgment of those who entertain the

(1) Law Rep. 9 Q. B. 153, at p. 155. (2) 2 Q. B. D. 30.
(3) Law Rep. 10 Q. B. 587.

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opposite opinion, I am of opinion that it has. This depends on the 19th section of the Judicature Act, 1873, taken in connection with the other provisions of that Act and the amending Acts of 1875 and 1876. In construing the 19th section it must be remembered that under these Acts this Court, while it has transferred to it by s. 18 all the powers of the Exchequer Chamber, has a very much more extensive jurisdiction than was ever possessed by that Court. It is authorized to hear appeals from every division of the High Court, and it can and does hear appeals from orders refusing new trials when the application for them is based on the ground of the verdict being against the weight of evidence, or of there being no evidence to support the verdict, and it can hear appeals from interlocutory orders made on matters of mere practice. Apparently it was intended by the legislature to give this Court the largest powers of hearing appeals, or rather to give to the suitor the amplest right of appeal. What, then, is the 19th section? This 19th section in terms gives an appeal from every judgment or order, save as thereinafter mentioned, of the High Court, and by the interpretation clause "order" includes "rule." The first point is, What are the exceptions referred to? They appear to be criminal cases, in which there is no appeal, save for some error of law apparent upon the record (s. 47), orders by consent or as to costs (s. 49), and cases where by Act of Parliament the decision of any Court or judge whose jurisdiction is transferred to the High Court of Justice is to be final (Act of 1876, s. 20). This case does not come within any of these exceptions, for it is not suggested that there is anything of a criminal nature in the case; and although before the Judicature Acts there was no appeal in such cases as the present from the Court of Queen's Bench, it is not suggested that there is any Act of Parliament which makes the decision of the Queen's Bench in such cases final. And the necessity for the 20th section of the Act of 1876 shews what a large power of hearing appeals had in the opinion of the legislature been granted to this Court. That which is brought before us for review by the defendants is in form a rule or order of the Queen's Bench Division, discharging a rule nisi and directing that the order of the sessions be affirmed. This, having regard to the interpretation clause, is an order of the

Queen's Bench Division within the meaning of the 19th section, and it lies on those, who contend that though the case is not within any of the exceptions mentioned in s. 19 there is no appeal, to make out their case. How is it shewn that it is not within our jurisdiction to entertain the appeal? As I understand the argument, it is that as the case is one as to the amount of rate to be charged on the railway company, the decision of the matter is under Act of Parliament given to the quarter sessions, and that they are finally to decide the matter without appeal from their decision, and that the order of the Queen's Bench is a mere statement of opinion on which the sessions will act, and it is therefore not subject to appeal. I acquiesce in the view that the litigants, as to the validity and amount of the rate, cannot as of right appeal from the decision of the sessions, and cannot insist on the decision of the sessions being in any way reviewed. But in the present case the sessions have stated a case, and the question for us is not whether there is an appeal from the judgment of the sessions, but whether the opinion of the Queen's Bench Division, expressed by the rule appealed from, is not open to review. The case of *Reg.* v. *Chantrell* (1) is an authority that the power of the Queen's Bench to entertain the case, even on the submission of the sessions, depends on that Court having power to issue a writ of certiorari to bring the case before it. In that case Mr. Justice Field, delivering the judgment of the Court, consisting of himself and Lord Blackburn, says (p. 589): "The question whether a case was one of difficulty or not fit to be reserved for the Court was to be determined by the sessions, and not by the parties; but if they found it one of difficulty and stated a case for the opinion of the Court, then it became necessary that a certiorari should issue to bring that case before the Court, that being the only mode by which the order could be brought into the court having jurisdiction to quash or confirm it." In that case the justices had convicted subject to a case for the opinion of the Court; but as the Act under which the conviction was made expressly enacted that convictions under it should not be quashed for errors in form or be removed by certiorari, the Court held that even though a case had been stated by the justices they could

(1) Law Rep. 10 Q. B. 587.

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not entertain the question. In a case where the Queen's Bench Division has, without any submission of the sessions, power to issue and has issued a writ of certiorari, any order made by that Court in a matter not within the exceptions already referred to would be subject to an appeal to this Court; in my opinion there is no sufficient reason why an order, which can only be made by that Court in cases where it has power to issue a certiorari, should not be subject to appeal, because the submission of the sessions has enabled the Court to issue the writ.

But it is urged that if this Court should differ from the opinion of the Queen's Bench Division, this Court has no power to compel the sessions to obey any order made on the appeal. It does not appear that the Queen's Bench could enforce obedience to its opinion, if opinion only; all it could do would be to quash or affirm the order of sessions; and if in fact, for the purpose of expressing its opinion, it makes an order to quash the order of sessions, I see no reason why this Court should not do so on appeal, as it has power to make such order as the Court appealed from ought to have made. Neither, in my opinion, is it a sufficient argument against the right of appeal, that the operative order as regards the rate must be that of the sessions. In many cases on appeal to the House of Lords from the Court of Chancery it was the practice of the House of Lords to remit the case to the Court below, with a direction as to the rights of parties; and in cases where it was necessary to enforce an order of the House of Lords, made on appeal from the Court of Chancery, it was the practice, for the purpose of enforcing the order of the House of Lords, to make it an order of the Court of Chancery.

The case then stands thus: in some way not explained a practice now well established has grown up, under which the sessions give their judgment in these cases, subject to a case for the opinion of the Queen's Bench. The writ of certiorari is then issued for the purpose of bringing the matter before that Court, which gives its opinion, not as was the practice on cases sent by the Court of Chancery for the opinion of Common Law Courts, by the certificate signed by the judges who heard the case argued, but by a rule or order. This rule is within the express terms of the 19th section of the Act of 1873, and in my opinion there is no sufficient

reason for saying that it is not under the section subject to appeal.

I have not adverted to s. 45 of the Act of 1873. It has not been shewn that in any case there is what can strictly be called an appeal from petty or quarter sessions to the High Court, though it has been suggested that there are or may be such cases. If there are not, then, on the fair construction of that section, it must, in my opinion, be taken to apply to cases like the present, where, though in form there is no appeal from the sessions, there is in substance a review of their decision.

In my opinion this Court is, under s. 19 of the Act of 1873, bound to hear this appeal.

BRETT, L.J. I am of opinion that this Court has no jurisdiction to hear this appeal. I think the judgment to be delivered by the Lord Chief Justice is right, and I agree with it on the ground that that which is brought before us is neither a judgment nor an order of the Queen's Bench Division. It is an opinion expressed for the guidance of the court of quarter sessions, and it is not a binding decision.

BRAMWELL, L.J. I am of opinion that an appeal lies in this case. The Lord Chief Justice has favoured me with his judgment, and I agree with nearly, if not all that he has written. There is no original jurisdiction in the Queen's Bench as to poor law matter; appeal is the creature of statute; the sessions need not state a case for the opinion of the Court, it is a case for its opinion. To my mind these considerations do not solve the question; at the outside they present considerations tending one way only; it is necessary to look at those that tend the other way. I will proceed to state them. The Judicature Act intended, as a rule of all but universal application, that there should be an appeal from the High Court to the Court of Appeal in every case where the High Court has given a judgment, order, or decision; the one exception is of criminal matters, which were not the subject of error; this exception shews that everything else was intended to be appealable. I think that an appeal would lie even without the enactment in s. 45, though it would, to my mind, be

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more doubtful than it is with that section, for it might be said that the opinion or advice asked by the sessions and given was not a "judgment or order" within s. 19. I think it would be; I propose, however, to examine the question in connection with that section. We start with this, that proceedings on the Crown side of the division are as a rule the subject of appeal. Then s. 45 of the original Judicature Act says, "all appeals from petty or quarter sessions" which might have been brought to any Court or judge may be heard before a new Court, and the determination thereof "shall be final unless special leave to appeal" is given by such Court, &c. This section, therefore, contemplates that there was an "appeal" from quarter sessions to one of the Courts whose jurisdiction is transferred, and that from the decision on that appeal there may be a further appeal to the Court of Appeal. Now, what appeals were there from quarter sessions? I speak with reserve, because I have no familiarity with the matter. I believe that there is no appeal strictly so called, nor, indeed, anything in the nature of an appeal from quarter sessions given by statute to the Queen's Bench; that the jurisdiction of the Queen's Bench was always and still is exercised by certiorari under powers of the common law; a jurisdiction not limited to quarter sessions, but extending to other cases where orders are made by courts or bodies having judicial powers. On the Queen's Bench being informed that there is invalidity in the proceedings of the inferior Court on the face of them, not an error of decision, but a want of authority or excess, a certiorari issues, and on the order being brought up, it is quashed if the objection is sustained; if not sustained, it remains in force and a procedendo issues. This, no doubt, is not what a lawyer, speaking strictly, would call an "appeal," but practically it is an appeal; it is so called by every lawyer even when speaking gravely on the subject, and undoubtedly it would be difficult to make any one not a lawyer understand why "appeal" was not the right word. But assuming it not to be, it is a rule of law and good sense that where you have words used which have no application in their primary or strict sense, you must, if you can, apply them in a secondary or popular sense; and, therefore, if there is nothing that can be strictly called an appeal from quarter sessions, nor anything that

can in any way be so called except proceedings by certiorari, which in substance are appeals, the legislature must be taken to have meant them. Still I admit that if the enactment is of impossible application, it must be disregarded. But is it? Let us examine the matter. I repeat, I speak with reserve; but, as I understand, where an order of quarter sessions is brought up on certiorari, and it is proposed to quash it, a rule for that purpose is obtained and made absolute or discharged. I refer to where there is no case stated, but where a defect on the face of the order is alleged to exist. It must be admitted that there is no difficulty in applying the statute to such a case; is there where there is no defect on the face of the proceedings, unless the special case is referred to? I see none. No doubt the origin of the matter was as the Lord Chief Justice mentions in his judgment; no doubt it was a contrivance to get the opinion of the Queen's Bench; no doubt it was an opinion asked for which the sessions might have disregarded. But has not this mos pro lege become lex? The procedure is the same as where a defect on the face of the proceedings is relied on, except that a rule nisi is taken as granted. Has not the legislature said if the sessions want the opinion of the Queen's Bench, they must seek it subject to that opinion being revised by the Court of Appeal? If they can disregard the opinion of the Queen's Bench, so they can that of the Court of Appeal; if they do not choose to ask it subject to revision, they can still refuse to do so. Is it to be supposed that where a case is granted and stated, and there is also an alleged defect on the face of the proceedings, independently of the case stated, the Court of Appeal may examine the latter and not the former matter? Or is it said, that appeal lies where there is a defect on the face of the proceedings, but not where a case is stated? On the substance of the matter I cannot see why there should not be an appeal in these cases: they continually involve questions of the utmost importance. As to the expense, with all submission be it said, the legislature, which passed a law that has given a power to make the trumpery appeals that are made, was not likely to be deterred by that consideration in these sessions cases, on which thousands are often at stake, especially as there must be leave to appeal.

I ought to mention one matter which tells against the appeal

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possibly, namely, that in some cases the order of sessions is neither quashed nor affirmed, but sent back with a direction or opinion. But if we look at the substance of the matter, it is equally a decision, as much as a direction for a new trial, which is no judgment on the case.

I am of opinion that an appeal lies, and that the case should be considered on the merits. I am also of opinion that even if we cannot consider the question arising on the case stated, we have jurisdiction to hear the appeal, and that our judgment should be that it be dismissed, because the judgment below is right as far we have power to examine it.

COCKBURN, C.J. This is an appeal from a decision of the Queen's Bench Division, affirming the order of the court of quarter sessions for the borough of Walsall, on an appeal against a poor-rate made on the appellants. The question, with which in the present stage of this appeal we are alone concerned, is whether this Court has any appellate jurisdiction to review a decision of the Queen's Bench Division in the matter of a poor-rate. I am of opinion that it has not. It is true that by the 19th section of the original Judicature Act, it is enacted that the Court of Appeal shall have jurisdiction and power to hear and determine appeals from any "judgment or order" of the High Court of Justice or of any judges or judge thereof. The fallacy in the reasoning, which seeks to apply this enactment to the decision of the Queen's Bench Division in the matter of a poor-rate, consists in treating such a decision as "a judgment or order" within the meaning of this section. To see this it is, as it seems to me, only necessary to examine, in what the jurisdiction of the Queen's Bench Division in the matter of an appeal against a poor-rate—if it can be properly called jurisdiction—consists, and how it arises.

Now, it is familiar knowledge that in matters relating to the maintenance of the poor, the Court of Queen's Bench has never, from the first establishment of the poor law, had jurisdiction, either as a court of the first instance or as a court of appeal, except, as regards the latter, so far as the court of quarter sessions has, of its own free will and mere motion, submitted its judgment to the opinion of the Court. And the reason is plain.

By the statutes, by which provision is made for the maintenance of the poor, the jurisdiction over matters connected with it is vested exclusively in justices of the peace in petty sessions in the first instance, and in the justices in quarter sessions on appeal. Of this the language of the statutes admits of no doubt whatsoever. By 43 Eliz. c. 2, s. 6, it is enacted "that if any person or persons shall find themselves grieved with any sess or tax or other act done by the said churchwardens and other persons, or by the said justices of the peace, that then it shall be lawful for the justices of the peace at their general quarter sessions, or the greater number of them, to take such order therein as to them shall be thought convenient, and the same to conclude and bind all the said parties."

By a later Act, 17 Geo. 2, c. 38, s. 4, it is enacted that, "in case any person or persons shall find him, her, or themselves, aggrieved by any rate or assessment made for the relief of the poor, or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein, or shall have any material objection to such account as aforesaid, or any part thereof, or shall find him, her, or themselves aggrieved by any neglect, act, or thing, done or omitted by the churchwardens and overseers of the poor, or by any of his Majesty's justices of the peace; it shall and may be lawful for such person or persons, in any of the cases aforesaid, giving reasonable notice to the churchwardens or overseers of the poor of the parish, township, or place, to appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation, or franchise, where such parish, township, or place lies; and the justices of the peace there assembled are hereby authorized and required to receive such appeal, and to hear and finally determine the same." In like manner, by the Act of 13 & 14 Car. 2, c. 12, by which the law of settlement was established, the appeal given to any persons who think themselves aggrieved by orders of removal, is to "the justices at quarter sessions, who are required to do them justice according to the merits of the case." No ulterior appeal is given to any other court.

Exclusive jurisdiction being thus given to the justices in petty

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sessions in the first instance, and to the quarter sessions on appeal, it has been long settled that, where once this jurisdiction of the court of quarter sessions on appeal has been exercised, the Court of Queen's Bench never had, and it follows therefore that the Queen's Bench Division of the High Court of Justice, which has taken its place, cannot have, any authority whatsoever except when put in motion by the sessions. If, indeed, the court of quarter sessions refuses to exercise jurisdiction when it has it, the Court of Queen's Bench will by mandamus compel that Court to hear and determine, in the same manner as it will prevent all other inferior Courts from declining jurisdiction where it exists, and so refusing to do justice. But if the jurisdiction has once been exercised, however erroneous the decision, if the order of the quarter sessions be regular on the face of it, so that it appears therefrom that the order of quarter sessions is within its jurisdiction and competency, the absence of which alone gives occasion to the interference of the superior Court, the Court of Queen's Bench has from the earliest time declared itself incompetent to interfere, the simple reason being, as has been again and again held, that it has no appellate jurisdiction over the court of quarter sessions in matters which are within the proper jurisdiction of the latter, which an appeal against a poor-rate undoubtedly is. Conclusive authority for this position is to be found in the following cases: In *Rex* v. *Justices of Monmouthshire* (1), the sessions, on an appeal against an order of removal, being equally divided as to the merits of the appeal, but being of opinion that the respondents ought to have proved the forty days' residence, but had not done so, quashed the order: a mandamus to compel them to rehear the case having been applied for, the rule was discharged. Abbott, C.J., says: "I think the rule for a mandamus ought to be discharged. It appears that in this case the sessions have given their judgment. This Court is not a court of error from that court. It may compel the sessions to proceed to hear and decide the appeal; but when they have so determined it, this Court cannot compel them to correct their judgment, if it appears to be erroneous. It is unnecessary to say, whether the judgment pronounced by the sessions is erroneous, because we are of opinion that if it were so, we have no authority

(1) 4 B. & C. 844.

to compel them to correct it." In a subsequent case of *Rex* v. *Justices of Monmouthshire* (1), the court of quarter sessions had been equally divided, but the equality had arisen from an interested justice having taken part in the decision. The Court being thus divided, an order was entered for adjourning the appeal. A certiorari having been applied for to bring up the order for adjournment with a view to quash it as a nullity, inasmuch as the vote of the interested justice ought not to have had any effect, the rule was discharged. Lord Tenterden says: "It is contended that though the justices were divided in point of fact, in point of law the vote given by the party interested was a nullity, and that the sessions ought to have quashed the order. The late decisions establish that we cannot assume to ourselves the jurisdiction of a court of error, and review the judgment of the sessions. It is said that the sessions had not jurisdiction to make the adjournment. It is clear they had jurisdiction to make any order concerning the appeal; and, among others, the order that the hearing should be adjourned. Here a judgment has been pronounced by the sessions relating to a matter over which the court had jurisdiction, and, assuming their judgment to be erroneous, I think we have not jurisdiction as a court of error to review it." Even where a judgment had been entered by mistake, owing to a miscalculation of the votes, the Court of Queen's Bench refused to interfere. Lord Ellenborough, after pointing out that on discovery of the mistake application to correct it should have been made to the court of quarter sessions itself, while still sitting, says: "No step of the sort was taken, but judgment was entered; and this Court cannot, in order to supply a remedy, exercise a jurisdiction which does not belong to it:" *Rex* v. *Justices of Leicestershire.* (2) It has been settled since the cases of *Rex* v. *Oulton* (3) and *Rex* v. *Preston-on-the-Hill* (4) that a bill of exceptions does not lie from the judgment of a court of quarter sessions. In the latter case Lord Hardwicke, C.J., says: "This is a case of great consequence, and there may be very great inconveniences on either side. It has been much wished that a bill of exceptions would lie to the justices at their sessions, because otherwise it may sometimes happen that

(1) 8 B. & C. 137.
(2) 1 M. & S. 442.
(3) Burr. Set. Cas. 64.
(4) Burr. Set. Cas. 77.

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they may determine in an arbitrary manner, contrary to the resolutions of the courts of law. For if the justices will not state the facts specially, though requested to do so, when the matter is doubtful, this is a very blameable conduct in them, and it is to be wished that it might be avoided. On the other hand, there may be very great inconvenience arising from the abuse of bills of exceptions; and this matter for the settlement of the poor, which ought to be rendered cheap and speedy, may by such means be rendered dilatory, expensive, and burdensome." The reporter adds that, "after a full hearing of the arguments on both sides, the Court were unanimously of opinion that a bill of exceptions doth not lie to the quarter sessions."

Nevertheless, though it is thus clear, on reference to the statutes and authorities, that the Court of Queen's Bench had no appellate jurisdiction, properly so called, in these matters, a practice became established, according to which the court of quarter sessions, in cases of difficulty, submitted their judgments to the opinion of the Court of King's Bench, and either affirmed or quashed the order appealed against according to its decision. Let us see what is the legal effect of the course thus adopted. The origin of this practice is matter of history. A full account of it is to be found in the learned judgment of Mr. Justice Field, in the case of *Reg.* v. *Chantrell.* (1) In remote times the jurisdiction of justices, as given by the commission of the peace, the terms of which are set forth in Dalton's Justice of the Peace, was subject to this proviso: "If any case of difficulty upon any of the premises before you, or any two of you, shall happen to arise, then let judgment in no wise be given thereupon before you or any two of you, unless in the presence of one of our justices of either bench, or of one of our justices appointed to hold the assizes in the county." "This," observes Mr. Justice Field, "not only empowers, but requires the justices in any case of difficulty to obtain the opinion of a judge; and, by implication, requires the judge to give his opinion." There is however nothing in this provision which makes it obligatory on the justices to adopt the opinion of the judge; still less, which enables the judge to pronounce an effective judgment independently of the justices. Accordingly, when called upon to

(1) Law Rep. 10 Q. B. 587.

decide on appeal as to the validity of orders made in parish matters, and in so doing to decide difficult questions of law on the construction of ill-drawn statutes, the courts of quarter sessions in cases of difficulty took the course of adjourning their decision till they had sought the advice of the judges of assize on the point or points of law which had arisen. Having obtained it, they entered their judgment accordingly. This practice being, however, attended with some inconvenience, as the judges of assize would not, generally speaking, have time to attend to such matters, so as to afford them sufficient consideration, a practice by degrees arose, suggested in all probability in the first instance by the judges of assize themselves, of resorting to the Court of King's Bench for its advice on the law as applicable to the facts,—these being stated, as found by the sessions, in the form of a special case. This practice is, however, comparatively of modern origin. As late as the 11 Wm. 3, Lord Holt and the Court of King's Bench refused to hear a case, which had been reserved for their opinion by a court of quarter sessions and remitted it to the judge of Assize. (1) In the time of Lord Hardwicke the modern practice prevailed, but had not entirely superseded the old. In *Rex* v. *Tedford* (2) the order of sessions, as there stated, recites that a case had been stated for the judges of assize, but that the judges of assize had not had time to hear and determine it. At a later period all traces of the old practice had disappeared, no doubt owing to the greater convenience of the modern.

In the practice, which thus became established, two singular anomalies arose. In the first place, the justices, though bound in all cases of difficulty to consult judicial authority, constituted themselves the sole judges of the cases in which such difficulty occurred; while, as there was under the statutes no appeal from their decision to the Court of King's Bench, there was no power in the latter court to compel them to state a case for its opinion.

It is true that there is inherent in the jurisdiction of the Court of Queen's Bench authority to bring before it by writ of certiorari, save where the writ is taken away by statutory enactment or charter, the proceedings of any court of inferior jurisdiction, with with a view to quash such proceedings. But this applies only

(1) Anonymous, 2 Salk. 486. (2) Burr. Set. Cas. 57.

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where there is some defect of jurisdiction or informality or defect apparent on the face of the proceedings. The Court cannot—and this must be carefully borne in mind—give itself appellate jurisdiction through the writ of certiorari, where it otherwise possesses none. "The writ of certiorari," says the Court of King's Bench in *Rex* v. *Moreley* (1), "does not go to try the merits of the question, but to see whether the limited jurisdiction have exceeded their bounds." It would be a mistake to suppose that because the order of sessions is brought before the Court by certiorari, the Court thereby acquires appellate jurisdiction. This plainly appears from the undoubted fact that a party, complaining of a wrongful decision of the sessions in respect of law or fact—so long as the proceedings have been regular and formal—could not on application to the Court of Queen's Bench obtain a writ of certiorari, to bring up the order of the quarter sessions for the purpose of its being considered on the merits. The case is in truth altogether an anomaly. In every other case the writ of certiorari is issued at the instance of the party aggrieved, and on a prima facie case being shewn of some ground why the proceedings in the inferior Court should be set aside. Here, without any ground being shewn or alleged, and not at the instance of the parties, save as matter of form, but in reality at the instance of the sessions with a view to obtain the opinion of the Court, the writ issues, solely for the purpose of bringing the proceedings before the Court, such being the only means, there being no power of appeal, of effecting that object. The law is correctly stated in Corner's Crown Practice, p. 66, and is fully borne out by the authorities there referred to. "Upon an order of quarter sessions made subject to the opinion of the Court of Queen's Bench on a case stated, and removed by certiorari, the Court will consider and determine any matter of law arising upon the facts found by the sessions and stated in the case, upon which their opinion may be asked; but if no case be stated for their opinion, the Court will not upon certiorari inquire further than whether the justices have acted within their jurisdiction, and whether their proceedings are regular upon the face of them, although their judgment on the facts of the case may appear to have been erroneous."

(1) 2 Burr. 1040.

In the second place, though the justices were directed to have recourse to judicial assistance before pronouncing judgment, they here took, and were allowed to take, the opposite course, namely, of first pronouncing their judgment, and then applying to the Court for its opinion. But here, inasmuch as—there being no appeal from the judgment of the quarter sessions or controlling power in the Court of Queen's Bench—the judgment of the quarter sessions, if once unconditionally pronounced, would have been final and conclusive; in order to avoid this consequence, and at the same time to prevent the necessity of the case being sent back to the sessions when the Court of King's Bench had pronounced its opinion, the practice became established for the court of quarter sessions to pronounce its judgment conditionally, making it subject to the opinion of the Court of King's Bench, according to which the judgment of the sessions was to be affirmed or quashed as the case might be. In furtherance of this course of proceeding, the order of sessions not being before it, and there being, as I have said, no other way by which the case stated by the sessions could be brought before it, the Court of Queen's Bench lent the assistance of its process of certiorari to bring up the order and case, that the Court might deal with it. Nothing can be better settled than that it is entirely at the discretion of the sessions whether to grant a case, and so to submit their judgment to the opinion of the Court of Queen's Bench, or not. Even though the appeal should be one in which in the proper exercise of their discretion they ought undoubtedly to grant a case in order that their judgment may be reviewed, if they refuse to do so, there are no means of compelling them. The decision of Lord Hardwicke and the Court of King's Bench in the cases of *Rex* v. *Oulton* (1) and *Rex* v. *Preston-on-the-Hill* (2), has never been questioned, and is undoubted law. And the reason is obvious. A poor-rate, like an order of removal, is made under statutory power. As has been shewn, the right of appeal given by the statutes to a party aggrieved is to the quarter sessions; and jurisdiction is given to that court to entertain and give judgment on such appeal either by affirming or quashing the order appealed against; but no ulterior right of appeal is given. The appeal lies to the court

(1) Burr. Set. Cas. 64. (2) Burr. Set. Cas. 77.

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of quarter sessions alone. The jurisdiction of the latter is absolute and final, and independent of that of any other court. No other court, not even the highest in the realm, has under the statutes just referred to any power to reverse or to interfere with the judgment of a court of quarter sessions when once pronounced.

One more observation remains to be made with reference to the jurisdiction of the quarter sessions, but it is a most important one. A Court, upon which is imposed by Act of Parliament the duty of adjudicating in a particular matter between litigant parties, cannot, unless authorized so to do, as part of its statutory power, transfer or delegate to another the whole or any portion of its jurisdiction, or give to the decisions of such other Court any binding force in law. In this exceptional and anomalous instance a practice—a sort of mos pro lege—has grown up, by which the court of quarter sessions makes its judgment depend on the opinion to be pronounced by the Court of Queen's Bench. But the ultimate judgment must still be considered as that of the sessions, whatever may be the form it assumes. For the right of appeal, which is the creation of the statute, is to the sessions alone; the jurisdiction is given to the sessions alone, without any ulterior appellate power being conferred on the Queen's Bench Division, or being capable of being transferred to it by the court of quarter sessions. If, therefore, the decision in such a case as the present were to be taken to be in point of law the judgment of the Queen's Bench Division, it would manifestly involve a usurpation of authority in the latter directly in the teeth of statutes, which have in express terms enacted that the decision of the court of quarter sessions shall be final. What takes place on the hearing in the divisional court is quite consistent with this view. All that is done on the decision of the Court being pronounced, is, that an entry is made in the master's book that the rule has been made absolute to affirm or quash the order of quarter sessions, as the case may be, and a rule is drawn up accordingly, and a copy of it sent to the clerk of the peace for the information of the quarter sessions, and is copied by him into the minute book of their proceedings. No instance has occurred in which the parties to the original order have failed to act on the decision of the Court of Queen's Bench, nor does it appear clear what means could be

resorted to to compel obedience, if necessary, the Court not having by the statute either original or appellate jurisdiction over the subject-matter. It thus appearing that, in the matter of a poor-rate or of any order of removal, the ancient Court of Queen's Bench had not, and consequently the present Queen's Bench Division has not, any original or any appellate jurisdiction, what then is the jurisdiction which it now exercises in these matters? I answer, consultative only. It directs the court of quarter sessions as to the law applicable to the facts stated in the special case. It supplies the condition according to which the judgment of the quarter sessions is to stand or fall—that judgment being that the order appealed against shall be affirmed or quashed, as the case may be, according to what shall be the opinion of the Queen's Bench Division. The intermediate decision is that of the Queen's Bench Division: the ultimate judgment is that of the Court in whom the jurisdiction is alone vested by the statute which creates the appeal, and by which court alone, in legal theory, it can be exercised. The divisional court has no authority whatever to pronounce any judgment whatsoever, the authority so to do being vested by the statutes in the court of quarter sessions alone; and the judgment is therefore of necessity that of the Court to which alone the appellate jurisdiction belongs. Hence arises the form in which the matter is submitted to the Court—not in that of a judgment of the court of quarter sessions to be affirmed or reversed by a judgment of the Court of Queen's Bench, but in that of a judgment which shall be capable of being moulded into an affirmative or negative one according to the "opinion," which the Court shall pronounce to be the right one. And the form is not unimportant. It is that the judgment shall be affirmed or reversed according to—not the judgment or decision, but—the "opinion" of the Queen's Bench Division.

Nor could it be otherwise. For, the ultimate appeal being by the express provision of the statute in the court of quarter sessions, and the latter having no statutory authority to delegate any part of its jurisdiction, the Court of Queen's Bench could not possibly have or exercise any appellate jurisdiction, which could have, proprio vigore, the force of law. It would be, as has been pointed out, a manifest usurpation on its part to assume it.

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In cases stated under 20 & 21 Vict. c. 43, the law is altogether different. There the magistrate is, under certain circumstances, bound to state a case; and by the 6th section of that Act, authority is expressly given to the Court, on a case submitted to it by a magistrate, to "reverse, affirm, or amend," the conviction appealed against. Nothing of the kind exists, where a case is stated by the quarter sessions for the opinion of the Court on an appeal against a poor-rate or an order of removal.

But, although no appellate jurisdiction is given, directly or indirectly, by the statute to the Court of Queen's Bench, and no authority is given to the court of quarter sessions to delegate its appellate authority to the former, beyond that of submitting to its opinion as to what the judgment of the court of quarter sessions should be, let us for the sake of argument suppose that the sessions can and do delegate their appellate jurisdiction to the superior Court by submitting the facts for its judgment as to the law; how can this operate so as to have the effect of involving a further submission to the decision of a third court, which is not the divisional court, because such court may have in general appellate jurisdiction over orders and judgments of the Queen's Bench Division, and thus have the effect of extending the submission without the assent of the court of quarter sessions? To grant or refuse a case is, as we have seen, in the uncontrolled discretion of the quarter sessions. They have given their judgment, subject to the opinion of the divisional court, on the case which they have thought proper to submit. By that opinion their judgment is to stand or fall; but how will it do so, if the opinion of the Queen's Bench Division shall be reversed by the decision of this Court in the exercise of its appellate jurisdiction—a jurisdiction in respect of this class of cases hitherto unknown and unheard of? How, in that event could it be said that the order, which was to be affirmed or quashed (as the case might be), according as the opinion of the Queen's Bench Division might be one way or the other, was rendered valid or invalid, in conformity to the opinion of that Court, if its decision is reversed? A decision reversed becomes a nullity. The judgment of a court of appeal, reversing that of a court appealed from, is not the judgment of the latter but of the former. How, then, will the judgment of this Court,

should it differ from that of the divisional court, satisfy the condition on which the judgment of the quarter sessions—who have plenary and exclusive jurisdiction over the subject-matter, and can make their submission to the Queen's Bench Division subject to such conditions as they think proper, and who have here submitted their judgment to the Queen's Bench Division and not to any other court—is, by the express terms of the submission, to depend? Can the terms of the submission be thus, without any assent on the part of the court of quarter sessions, enlarged, so as to give authority to this Court, which assuredly is not that of the Queen's Bench Division? And this brings me to the consideration of the question on still broader grounds. The primary purpose and intention of the legislature in creating the present Court of Appeal was, I apprehend, to transfer to it the appellate jurisdiction heretofore vested in the Court of Exchequer Chamber. In doing so, however, it has, it is true, used terms so large as to embrace, according to the decision of this Court, judgments and orders in matters of mere procedure, as to which no appeal from the divisional court previously existed. But I cannot think that it can have been the intention that the terms used should apply to cases in which there was no inherent jurisdiction in a divisional court, and which were not involved in the advance to some final judgment from which an appeal lay. It cannot have been intended, however general may be the terms of the section, to make, as it were, by a side-wind, parochial rates and orders of removal, matters which before were not the subjects of appeal, and could not be taken beyond the divisional court, liable to be brought before this Court, and consequently to be taken on a further appeal to the House of Lords, with all the expense attending on such an ultimate appeal, thus involving the inconvenience which, as was pointed out by Lord Hardwicke in *Rex* v. *Preston-on-the-Hill* (1), would result from rendering "dilatory, expensive, and burdensome," matters relating to the maintenance of the poor, which, as he observed, "should be cheap and speedy." The spirit of the present legislation is, I think apparent, from the provision introduced into the Act of 1876, by the 20th section of which, lest the general words of the 19th section of the Act of 1873, should have

(1) Burr. Set. Cas. 77.

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too extensive an operation, it is expressly provided that "where by Act of Parliament it is provided that the decision of any Court or judge, the jurisdiction of which Court or judge is transferred to the High Court of Justice, is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice or of any judge thereof to the Court of Appeal." It is true that this case is not within the precise terms of this enactment, inasmuch as the decision from which the right of appeal is here claimed is not one which is made final by Act of Parliament. But I apprehend that the only reason for not making the terms of the enactment sufficiently comprehensive to include such a case as the present, was simply that as it had never occurred to anyone to suppose that there could be an appeal from the decision of the Court of Queen's Bench in such a case, it was not deemed necessary to make the language apply to it in terms. That the case is within the spirit of the enactment cannot, I think, be doubted.

Whether, therefore, I look to the nature of the jurisdiction heretofore exercised by the Court of Queen's Bench, or to the object and intention of recent legislation, I can arrive at no other conclusion than that a decision of the divisional court on an appeal against a rate is not a judgment or order within the 19th section of the Judicature Act of 1873. I am therefore of opinion that this Court has not jurisdiction to entertain this appeal.

As the Court is equally divided upon the question of jurisdiction the result is that the appeal must be dismissed.

Appeal dismissed.

Solicitor for prosecutors: *R. F. Roberts.*

Solicitors for defendants: *Sharpe, Parkers, & Co, for Wilkinson & Gillespie, Walsall.*

THE QUEEN ON THE PROSECUTION OF THE GUARDIANS OF CARLISLE UNION, RESPONDENTS; *v.* THE GUARDIANS OF BRAMPTON UNION, APPELLANTS.

1878
June 22.

Poor Law—Settlement by Residence—Removal—39 & 40 *Vict. c.* 61, *s.* 34.

Under 39 & 40 Vict. c. 61, s. 34, which enacts that "where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise":—

Held, that a person who had resided in a parish for a term of three years, and who continued to reside there until the passing of the Act, but who, during the period subsequent to the three years, was in receipt of relief from the parish, acquired a settlement therein under the section.

UPON appeal to the Cumberland Quarter Sessions, against an order for the removal of J. Little from Carlisle to the appellant union, the order was confirmed subject to a case.

1 and 2. James Little, the pauper for whose removal the order appealed against was made, was born about 1810, at Williams Gill, in the parish of Farlam, in the appellant union.

3. In the year 1865 he went to reside at Gateshead, Durham, out of the appellant union, and continued to reside in Gateshead from that time till the 2nd of April, 1877.

4. He had, in the year 1866, acquired by his residence in Gateshead a status of irremovability from the Gateshead Union, entitling him not to be removed from the union, and the status of irremovability continued throughout his residence to the time of his going to Carlisle hereinafter mentioned.

5. At the latter part of the year 1869, Little, while so residing at Gateshead, met with an accident, and a few weeks afterwards began to receive relief from the Gateshead Union, and continued to receive weekly relief from the union till he went to reside at Carlisle, as stated in next paragraph.

6. On the 22nd of April, 1877, he went to Carlisle to stay with his daughter, and shortly afterwards was received into the workhouse of the Carlisle Union, where he has since then remained.

7. On the 6th of October, 1877, an order for the removal of

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Little was made by two justices for Cumberland, adjudging that the place of his last legal settlement was the parish of Farlam, in the appellant union, and ordering his removal to the appellant union.

8. The appellants appealed to the Cumberland quarter sessions, holden in January of the present year, against the order of removal, on the ground, amongst others, that Little had, by virtue of the facts stated in paragraphs 3 and 4, obtained a legal settlement in the Gateshead Union, and the sessions being of opinion that Little had not obtained a legal settlement in the Gateshead Union, and that the place of his last legal settlement was the parish of Farlam, in the appellant union, confirmed the order.

The question for the opinion of the Court is, whether, on the 6th of October, 1877, Little had a legal settlement in the Gateshead Union.

Poland (*Shee* and *Mattinson* with him), for the respondents. The question turns entirely upon the true construction of 39 & 40 Vict. c. 61, s. 34. It has been already decided by this Court in *Reg.* v. *Ipswich Union* (1), that a pauper who had resided in a parish for a term of three years, but whose residence therein had ended before the passing of the Act, did not acquire a settlement under this section. This decision must govern the present case. No doubt the pauper was bodily present in the Gateshead Union when the Act came into operation in 1876, but for several years he had been in receipt of relief, and as a residence under such circumstances cannot confer a status of irremovability, it is not a residence within the meaning of s. 34.

[COCKBURN, C.J. The fact of his receiving relief did not make him removable.

LUSH, J. In *Reg.* v. *Ipswich Union* (1) the pauper had left the parish before the passing of the Act.]

The effect of the decision is, that the section does not apply to a case where the three years' residence was at some remote period before the Act, and the residence now under consideration is of the same character, as it was practically completed in 1869.

Henry (*Elliott* with him), for the appellants, was not heard.

(1) 2 Q. B. D. 269.

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COCKBURN, C.J. I think the order of sessions must be quashed. If it were necessary to include the time during which the pauper received relief in order to make up the three years' residence, the case would be different. But he had completed the full term of three years' residence in the Gateshead Union before he became in receipt of relief, and continued to reside in that union till the passing of the Act. Under these circumstances I think he had resided three years in that union within the meaning of the section, and acquired a settlement there.

MELLOR, J., and LUSH, J., concurred.

Order of Sessions quashed.

Solicitors for appellants: *Remnant & Penley.*
Solicitors for respondents: *Gray & Mounsey.*

HINDLEY, APPELLANT; HASLAM AND OTHERS, RESPONDENTS.

June 22.

Employers and Workmen Act (38 & 39 *Vict. c.* 90), *ss.* 3, 4—*Proceedings taken first in County Court, and then before Justices—Res Judicata—Counter-claim.*

By the Employers and Workmen Act (38 & 39 Vict. c. 90), s. 3, "In any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such, the Court may . . . adjust and set off the one against the other, all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the Court may find to be subsisting, whether such claims are liquidated or unliquidated and are for wages, damages, or otherwise." By s. 4, "A dispute under the Act between an employer and a workman may be heard and determined by a Court of summary jurisdiction, and such Court for the purposes of this Act shall be deemed to be a Court of civil jurisdiction, and in a proceeding in relation to any such dispute the Court may order payment of any sum which it may find to be due as wages or damages . . . . provided that . . . . the Court shall not exercise jurisdiction when the amount exceeds 10*l.*"

The appellant was employed as a spinner by the respondents, and was discharged for neglecting his work, the respondents refusing to pay him wages in lieu of notice. He took proceedings against them in the county court. At the hearing no counter-claim or set-off was filed or set up, but evidence was produced to shew that he had been guilty of negligence. A verdict for 3*l.* 10*s.* was given in his favour:—

Held, that the respondents were not precluded from preferring a claim before justices against him for wrongfully and negligently damaging their materials, for the only matter decided by the county court was whether there was such negligence on his part as would justify his dismissal without notice.

CASE stated by justices for the borough of Bolton, Lancaster, under 20 & 21 Vict. c. 43.

1878.

HINDLEY v. HASLAM.

A claim preferred on the 6th of May, 1878, by the respondents against the appellant, of which the following were the particulars: "the plaintiffs (respondents) claim 8*l.* 8*s.* damages for that the defendant (appellant), being a workman, and having entered into a contract personally to execute certain work for the plaintiffs, his employers, on or before the 11th day of March, 1878, on the plaintiff's materials delivered to him, wrongfully and negligently damaged the materials," was heard by the justices, and the appellant ordered to pay to the respondents the sum of 8*l.* 8*s.* and costs.

The appellant, previous to the 13th day of February last, was employed as a spinner by the respondents to spin numbers 32 twist, but on the day was instructed by the respondents' overlooker to change to numbers 36 twist, a special quality. He was supplied with rovings of sufficient quality, and the appellant commenced to spin it. The overlooker complained to the appellant of inattention, and eventually discharged him for neglect of work. Samples of yarn so spun, and alleged to be spoiled by the appellant, were produced in court. The appellant did not call any witnesses, and the justices found as facts that he had been guilty of such negligence as warranted the respondents in charging him with the loss, and that the loss sustained was 8*l.* 8*s.*

It appeared that upon the discharge of the appellant, the respondents paid him the wages he had actually earned, but refused to pay him wages in lieu of notice, whereupon he took proceedings against them in the county court, to recover a sum in lieu of such notice. At the hearing no counter-claim or set-off was filed or set up, but the overlooker stated that he then gave in substance the same evidence as before the justices, and a verdict for 3*l.* 10*s.* was given in favour of the appellant.

The appellant made the following objections to the jurisdiction of the justices:—

1st. That this was not a dispute between employers and workmen within the Employers and Workmen Act, 1875.

2nd. That it was incumbent on the master to deduct any loss he had sustained by wilful negligence from the wages due to the workman.

3rd. That the judgment of the county court precluded the claim of the respondents on the ground that the same matters in

dispute between the same parties had already been decided by the county court judge having competent jurisdiction by the Employers and Workmen Act, 1875. (1)

The justices were of opinion that their jurisdiction was not ousted and made the order above-mentioned.

McIntyre, Q.C., and *A. L. Smith*, for the appellant. The judgment of the county court, that there was no such negligence as would justify the appellant's dismissal, substantially disposed of the whole matter, and the justices had no jurisdiction to entertain the claim. Jurisdiction over disputes between masters and workmen is given to two tribunals, but it must be taken to have been meant that the whole dispute should be decided by the same tribunal. In *Routledge* v. *Hislop* (2), a servant sued her master in a county court for discharging her without reasonable and probable causes, and there was a verdict for the defendant. It was held that she could not take out a summons before justices to recover her wages, and that varying the form of claim where the claim itself was the same did not prevent the former decision from being conclusive.

[LUSH, J. The negligence may not have been sufficient to justify dismissal, but sufficient to justify a claim for damages.]

Secondly, the claim before the justices was not a dispute within the meaning of the Act. The disputes contemplated by the Act were disputes relating to wages, and not a claim for damages for injury to goods.

(1) By the Employers and Workmen Act (38 & 39 Vict. c. 90), s. 3: "In any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such, the Court . . . . may adjust and set off the one against the other, all such claims on the part either of the employer or of the workman arising out of or incidental to the relation between them as the Court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise."

By s. 4: "A dispute under the Act between an employer and a workman may be heard and determined by a Court of summary jurisdiction, and such Court for the purposes of this Act shall be deemed to be a Court of civil jurisdiction, and in a proceeding in relation to any such dispute the Court may order payment of any sum which it may find to be due as wages or damages . . . . provided that . . . . the Court shall not exercise jurisdiction where the amount claimed exceeds 10*l.*"

(2) 29 L. J. (M.C.) 90.

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[LUSH, J. Surely this is a dispute incidental to the relation between the employer and his workman.]

Herschell, Q.C. (*Crompton* with him), for the respondents, was not heard.

COCKBURN, C.J. Our judgment must be for the respondents. The matter in question before the justices was one which the county court judge was not called upon to decide.

MELLOR, J. I am bound to say that I think it most inconvenient that a controversy involving so small a sum should be divided and go before two different tribunals, but I think the justices had jurisdiction to make this order.

LUSH, J. I am of the same opinion. I cannot see that the respondents were bound to bring this matter before the county court judge by way of counter-claim.

Judgment for the respondents.

Solicitors for appellant: *Chester, Urquhart, & Co., agents for Fielding, Bolton.*

Solicitors for respondents: *Clarke, Woodcock, & Ryland.*

[IN THE COURT OF APPEAL.]

Jan. 28.

MULLINER *v.* FLORENCE.

Innkeeper—Lien on Goods of Guest—General and Particular Lien—Waiver of Lien by Sale of Chattel subject to it.

42 L.J.D. 163

The lien of an innkeeper is general, and extends to all goods and chattels belonging to his guest, and therefore a chattel, although deposited with the innkeeper and placed by him apart from the personal goods of the guest, may be detained by him on account of money owing to him for the lodging, food, and entertainment of the guest.

The lien of an innkeeper over a chattel belonging to a guest is waived, if in order to reimburse himself he sells it, and this rule holds good even although the retention of the chattel is attended with expense.

ACTION for the detention and conversion of horses, carriages, and harness.

At the trial at the Warwickshire Summer Assizes, 1877, before

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Pollock, B., the following facts were given in evidence. The defendant kept an inn at Coventry, and at the end of September, 1876, one Bennett came to the defendant's inn and stayed there as a guest until the middle of January, 1877, when he quitted the inn. Bennett was received by the defendant as an ordinary guest, and at the time of his departure from the inn he owed the defendant 109*l.* for lodging, food, and entertainment. In November, 1876, a pair of horses, waggonette, and harness came to the defendant's inn for Bennett; he told the defendant that he had bought them from the plaintiff who lived at Leamington. The horses, waggonette, and harness were not taken in at livery, but were received by the defendant as a part of the property of his guest Bennett. At the time when the latter quitted the inn, he was in debt to the defendant for the keep of these horses, and the defendant claimed on this account from him 22*l.* 10*s.* Bennett left the horses, waggonette, and harness behind him at the defendant's inn. It was afterwards ascertained that Bennett was a swindler, and that he had bought the horses from the plaintiff upon the terms that if they should not be paid for they should be returned to him free of expense. Bennett did not pay the price for the horses. The plaintiff demanded from the defendant possession of the horses, waggonette, and harness, and tendered to him a sum of 20*l.* for the keep of the horses; but the defendant refused to give up the horses, waggonette, and harness. The defendant sold the horses by auction for 73*l.*, but he retained possession of the waggonette and harness. Bennett was afterwards convicted of fraud, and sentenced to penal servitude. The defendant claimed to keep the proceeds of the sale, and also to retain the waggonette and harness, on account of the sums of 109*l.* and 22*l.* 10*s.*

Upon these facts the learned judge directed judgment to be entered for the defendant.

Jan. 26, 28. *Sir James Stephen, Q.C.*, and *J. S. Dugdale*, for the plaintiff. Two question arise in this case: first, what is the extent of an innkeeper's lien? secondly, whether the sale of a chattel so entirely destroys a valid lien attaching upon it, that the owner of it can treat the sale as a wrongful conversion?

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As to the first question, it is admitted for the plaintiff, that an innkeeper is entitled to a general lien for the amount of his bill over the goods accompanying the person of his guest; but it is contended, that when a chattel is deposited with an innkeeper, and is kept by him apart from the personal goods of the guest, his lien for the food, lodging, and entertainment of the latter does not extend to it. The earlier authorities seem, at least indirectly, to shew that the lien of an innkeeper over a horse left with him by a guest, is not general: thus in *Moss* v. *Townsend* (1), the custom of London was stated to be that if a horse is left at an inn and eats up more than his price, the innkeeper may sell the horse to pay for meat supplied to him, but not for meat supplied to other horses. It was held in more cases than one, that if a horse is brought by a stranger to an inn and is there left, the owner cannot take away the horse without paying what is due for the meat thereof, although the horse was brought to the inn without the owner's consent: *Robinson* v. *Walter* (2), *Stirt* v. *Drungold* (3); but in the latter case it was questioned whether a saddle, bridle, and cloth brought to the inn together with the horse, could be detained. These decisions are not opposed to the right of the present plaintiff to sue, and the reasons of the judgments seem to favour the view advanced upon his behalf. In *Rosse* v. *Bramsteed* (4), it was said by Crooke, apparently with the approval of the Court of King's Bench, that a horse brought to an inn may be detained for the provender supplied to him but not for the lodging of the guest. The modern cases as to the extent of the innkeeper's lien are not in point; they may shew that the innkeeper's lien extends to the goods of a third person, if he receives them in the belief that they belong to his guest: *Turrill* v. *Crawley* (5); *Threfall* v. *Borwick* (6); but a different rule prevails where the innkeeper knows that the goods are not the property of the guest: *Broadwood* v. *Granara*. (7)

As to the second point, it is contended that a lien conveys no right to sell: *Coggs* v. *Bernard* (8), and if a thing subject to a

(1) 1 Buls. 207.
(2) 3 Buls. 269.
(3) 3 Buls. 289.
(4) 2 Roll. Rep. 438, cited in Bacon's Abridgment Inns and Innkeepers (D).
(5) 13 Q. B. 197.
(6) Law Rep. 10 Q. B. 210.
(7) 10 Ex. 417.
(8) 1 Sm. L. C. at p. 217 (7th ed.).

lien be sold, the lien is destroyed: *Jones* v. *Pearle* (1); *Jones* v. *Thurloe* (2), and it is immaterial that the detention of the chattel may be attended with expense: *Thames Ironworks Co.* v. *Patent Derrick Co.* (3) The distinction between a pledge and a lien is pointed out by Blackburn, J., in *Donald* v. *Suckling.* (4) A person who, in any manner, voluntarily parts with a chattel loses all right of lien over it: *Jones* v. *Thurloe* (5); *Jacobs* v. *Latour* (6); *Clark* v. *Gilbert* (7); *Legg* v. *Evans* (8); *Hartley* v. *Hitchcock* (9). A person entitled to a lien for a debt cannot add to the amount, for which the lien exists, a charge for keeping the chattel until the debt is paid: *Somes* v. *British Empire Shipping Co.* (10)

Mellor, Q.C., and *Graham*, for the defendant. As to the first question, if the argument for the plaintiff were correct, an innkeeper would be compelled to apportion his charges, although the contract under which he receives his guest and his guest's property is entire. It is submitted that such a rule of law would impose an unnecessary burden upon an innkeeper: it would be unreasonable if he could only detain his guest's luggage for personal charges and his guest's horse for provender supplied to it.

As to the second question, it may be assumed against the defendant that the sale was wrongful, but the plaintiff cannot recover in this action because he did not tender the whole amount due from Bennett to the plaintiff. *Halliday* v. *Holgate* (11) shews that upon a sale by a pledgee, the pledgor cannot recover for the conversion without tendering the amount due, and no reason exists why the same rule should not prevail as to a lien.

[COTTON, L.J. Is there not this distinction between a pledge and a lien? in the former case there has been a contract to repay, whereas in the latter the right to detain is created merely by the common law for the benefit of the creditor.]

The lien of an innkeeper arises out of the contract to receive and entertain made between him and the guest.

(1) 1 Str. 557.
(2) 8 Mod. 172, per Pratt, C.J.
(3) 1 J. & H. 93; 29 L. J. (Ch.) 714.
(4) Law Rep. 1 Q. B. 585, at p. 612.
(5) 8 Mod. 172.
(6) 5 Bing. 130.
(7) 2 Bing. (N.C.) 343.
(8) 6 M. & W. 36.
(9) 1 Stark. 408.
(10) 8 H. L. C. 338.
(11) Law Rep. 3 Ex. 299.

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A third question arises as to the damages. As the plaintiff has sustained no legal injury, he is entitled to only nominal damages even if the action be maintainable: *Chinery* v. *Viall* (1); *Johnson* v. *Stear* (2); *Donald* v. *Suckling* (3); *Brierley* v. *Kendall.* (4) The plaintiff was not willing to pay the amount actually due, and therefore cannot rely upon *Jones* v. *Tarleton.* (5) If the horses had not been sold, the plaintiff could not have obtained possession of them without paying the defendant what was due to him in respect of his lien. What, then, has the plaintiff lost by the conversion? He has lost the value of the horses minus what he would have had to pay to get them back. That sum is the measure of the damages if the plaintiff can recover any amount in respect of the horses.

Sir James Stephen, Q.C., in reply.

BRAMWELL, L.J. The first question for our decision is, what was the innkeeper's lien; was it a lien on the horses for the charges in respect of the horses, and on the carriage in respect of the charges of the carriage and no lien on them for the guest's reasonable expenses, or was it a general lien on the horses and carriage and guest's goods conjointly for the whole amount of the defendant's claim as innkeeper. I am of opinion that the latter was the true view as to his lien, and for this reason, that the debt in respect of which the lien was claimed was one debt, although that debt was made up of several items. An innkeeper may demand the expenses before he receives the guest, but if he does not, and takes him in and finds him in all things that the guest requires it is one contract, and the lien that he has is a lien in respect of the whole contract to pay for the things that are supplied to him while he is a guest. If this was not the case a man might go to an hotel with his wife, and then it might be said that the innkeeper's lien was on the guest's luggage for what he had consumed, and on the wife's luggage for what she had had. The contract was, that the guest and his horses and carriage shall be received and provided for; there was one contract, one debt, and one lien in respect of the whole of the charges. The cases cited

(1) 5 H. & N. 288.
(2) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.
(3) Law Rep. 1 Q. B. 585.
(4) 17 Q. B. 937.
(5) 9 M. & W. 675.

on behalf of the plaintiff are really against him. In order to justify the argument for him, it ought to be shewn that if fifty pieces of cloth are sent to a dyer under one contract, he would only have a lien on each piece for the work done in respect of it. It seems to me, therefore, in this case the lien is a general lien. So far our judgment is for the defendant.

On the second question, namely, whether the sale was wrongful, I think the learned judge was wrong. The defendant, who had only a lien on the horses, was not justified in selling them, and he has therefore been guilty of a conversion, and that enables the plaintiff to maintain this action for the proceeds of the sale. The very notion of a lien is, that if the person who is entitled to the lien, for his own benefit parts with the chattel over which he claims to exercise it, he is guilty of a tortious act. He must not dispose of the chattel so as to give someone else a right of possession as against himself. The lien is the right of the creditor to retain the goods until the debt is paid. It is quite clear that the defendant could not use the horses, yet it is suggested that he can sell them and confer a title upon another person. Several cases were cited, but none of them are inconsistent with the present. Those mainly relied on were *Donald* v. *Suckling* (1) and *Johnson* v. *Stear*. (2) In the latter case it was no doubt held that the sale by the pledgee of an article pledged to him was tortious, and that the action could be maintained. But looking at the substance of the thing, and at the decision of *Halliday* v. *Holgate* (3), in all these cases the Courts held that although the pledgee in repledging the article had exceeded what he had a right to do, yet inasmuch as there remained in the pledgee an interest, not put an end to by the unauthorized pledge, he could transfer the pledge to another person. In *Johnson* v. *Stear* (2) it certainly was held to be a tortious conversion. In the other two cases it was held not to be so. What in substance those cases decided was, that as the interest under the original pledge was not determined, the immediate right to the possession of the chattels was not re-vested in the pledgor so as to give him a right of action. Those cases, however, were cases between the pledgor and the pledgee, and have nothing

(1) Law Rep. 1 Q. B. 585. (2) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.
(3) Law Rep. 3 Ex. 299.

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whatever to do with the present case. The interests of the pledgee there could be assigned, but here the parting with the chattels subject to the lien destroyed it.

The third question argued was as to the amount of damages. The general rule is that where a person converts property to his own use by selling it and receives the price, he is liable for the value of the article, and he cannot set-off. Now what were the authorities cited to the contrary? *Chinery* v. *Viall* (1) is distinguishable on the ground that the case was decided on its special facts. The ground of the decision was that "as the vendor could not sue for goods bargained and sold, the result would be that he could not in any form of action recover the price; and it would be singular if the same act which saved the vendee the price of the sheep should vest in him a right of action for the full value without deducting the price." I cast no doubt on that case; the ground on which it is based is different. The next case was *Brierley* v. *Kendall.* (2) That was an action of trespass, and the plaintiff had mortgaged the goods wrongfully seized by the defendants as a security for money advanced by them to him. Another case was *Johnson* v. *Stear* (3). I only wish to add one word as to that case; the Court there held that the action was maintainable, but I see that Blackburn, J., in his judgment in *Donald* v. *Suckling* (4), doubts whether that case was rightly decided, because he says, "This can be reconciled with the cases above cited, of which *Fenn* v. *Bittleston* (5) is one, by the distinction that the sale, though wrongful, was not so inconsistent with the object of the contract or pledge as to amount to a repudiation of it, though I own that I do not find this distinction in the judgment of *Johnson* v. *Stear*." (3) So that Blackburn, J., doubts whether the Court of Common Pleas were right in that case in giving the plaintiff even nominal damages. Whether that decision is right or not, the plaintiff clearly was not entitled to substantial damages. The reasoning in that case, however, is not applicable to the present. But there is a remark of Williams, J.,

(1) 5 H. & N. 288; 29 L. J. (Ex.) 180.

(2) 17 Q. B. 937; 21 L. J. (Q.B.) 161.

(3) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.

(4) Law Rep. 1 Q. B. at p. 617.

(5) 7 Ex. 152; 21 L. J. (Ex.) 41.

in his judgment, at p. 134, which I think is applicable, it is this: "The true doctrine as it seems to me is that whenever the plaintiff could have resumed the property, if he could lay his hands on it, and could have rightfully held it when resumed as the full and absolute owner, he is entitled to recover the value of it as damages in the action of trover which stands in the place of such resumption." Now in this case if the plaintiff after the sale of the horses had thought fit to go to the vendee and say to him "Those horses are mine," and the vendee had refused to give them up, he could have maintained an action against the vendee for the full value of the horses; but instead of acting in this manner he has treated the sale by the defendant as a conversion. He is not to be worse off because he has brought his action against the defendant instead of against the vendee. It is said if the plaintiff succeeds that the defendant's lien would be useless to him, and that the plaintiff would be better off than he was before the sale of the horses by the defendant. I do not think there is anything unreasonable in holding the defendant liable if the defendant was not bound to feed the horses. In a case of a distress damage feasant before the recent statute (12 & 13 Vict. c. 92) the distrainor was not bound to feed the animals distrained.

It seems to me therefore that the learned judge was wrong. I think that we ought to reverse the judgment, and give the plaintiff judgment for 73*l.*, but as the defendant has a lien on the carriage and harness for the whole bill, and that amount was not tendered, the defendant is entitled to retain his judgment as to the waggonette and harness. Under these circumstances the judgment will be entered for the plaintiff for 73*l.*, and as to the rest of the case the judgment will stand for the defendant.

BRETT, L.J. This was an action against the defendant in respect of a wrongful sale of the plaintiff's horses and in respect of a wrongful withholding from him of a carriage and harness. The defence set up is that the defendant held the horses and the carriage and harness under a lien, and that the plaintiff therefore could not maintain the action in respect of any of them. The lien claimed by the defendant was that of innkeeper.

The first question is, what is the extent of an innkeeper's lien,

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and to what goods did the lien attach? I am of opinion the lien attached both on the horses and the carriage and harness for the full amount of the innkeeper's bill. Where the innkeeper in the course of his ordinary business receives not only travellers but also their horses and carriages, he has an innkeeper's lien for his whole claim. He has one obligation, he is bound to receive the traveller and any horses or carriages he may bring with him; and as there is but one business, one obligation, and one contract, according to the custom of England, it gives him one lien, and the lien cannot be split up and a separate lien claimed in respect of separate chattels. Therefore here the defendant has a lien for the whole bill incurred by Bennett, and that lien is on the carriage and horses and harness.

With regard to the horses, the defendant has sold the horses; it was an unjustifiable sale; he had no right to sell them, and as he had only a lien, the sale destroyed the lien. If he had parted with the possession in the horses, he would have lost the lien, and so in the case of a wrongful sale the lien is destroyed. With regard to the carriage and harness, the defendant has a lien on them for his whole account. The plaintiff was willing to pay some portion of the bill, but he never was willing to pay the whole amount. Then it was said, although the defendant improperly sold the horses, yet the plaintiff is not entitled to maintain the action, because the defendant had a lien on them, and the plaintiff has not tendered the amount of the lien. But this argument is not tenable, for by the sale the lien was destroyed, and there is no debt due from the plaintiff to the defendant. It does not seem to me to be necessary to decide whether the cases cited were rightly decided or not. *Donald* v. *Suckling* (1), and *Halliday* v. *Holgate* (2), were cases not of lien, but where the property had been pledged with a power of sale: and the judgments in these cases were founded on the distinction which existed between the cases of pledge and lien, therefore those cases signify nothing this not being a case of pledge. With regard to *Johnson* v. *Stear* (3), that also was the case of property pledged, and it is no authority in the present instance. At all events, I should say that those

(1) Law Rep. 1 Q. B. 585.
(2) Law Rep. 3 Ex. 299.
(3) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.

cases were only authorities if the action had been brought by Bennett, but none whatever as against the plaintiff who is seeking to recover his own property.

With regard to the damages, even if *Johnson* v. *Stear* (1) be an authority against an action by Bennett, it is no authority as against the plaintiff, who has an absolute right of property, and as there has been a wrongful sale he is entitled to recover full damages. However *Johnson* v. *Stear* (1) would require very great consideration before it was acted upon.

As to the plaintiff's claim to the carriage and harness, the defendant had a lien on the carriage and harness, and the plaintiff cannot recover as to them, but he is entitled to recover the sum of 73*l.* in respect of the horses.

In the result, the plaintiff will have judgment for 73*l.*, which will carry the general costs of the cause, the defendant's costs to be deducted; and with respect to the appeal, as each party has substantially succeeded, no costs of the appeal will be allowed.

COTTON, L.J. The question is what is the defendant's lien as innkeeper? Is it a lien as to the whole bill in respect of all the things brought by the guest to the inn, or is it a separate lien as regards the horses and also with respect to the harness and carriage? The innkeeper has a general lien for the whole amount of his bill. As to the horses, harness, and carriage, there would be a lien for any special expenditure, and there is no reason for exempting the horses, harness, and carriage from the general lien an innkeeper has in the guest's goods by the general law. The innkeeper is bound to receive the horses, harness, and carriage with the guest as much as he is bound to receive the guest himself—the liability of the innkeeper with respect to them is the same as his liability with respect to the other goods of the guest, and there is no reason for excluding the claim of the innkeeper although the horses harness, and carriage are not received in the dwelling-house, but in adjoining buildings. There is no authority for saying that the innkeeper's lien does not extend to the horses, harness, and carriage the guest brings with him as much as to the other things of the guest.

(1) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.

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With regard to the harness and carriage, although the plaintiff tendered the amount due in respect of the horses, the defendant had a lien on the harness and carriage, and as to them the defendant is entitled to our judgment.

As to the horses, it was not contended that the sale was right, but the question was argued that as the plaintiff could not have taken them out of the hands of the defendant without satisfying his lien, he could not recover substantial damages. I do not accede to this argument. The defendant as an innkeeper has only a right to keep the horses until his bill is paid; he has parted with his possession, and has put an end to his right. The plaintiff therefore has an absolute title to the horses, and is entitled to such damages as amount to the real value. Although the defendant received the horses at the inn, and the innkeeper's lien attached, yet the lien is lost by the act of the defendant, and the innkeeper cannot claim anything as against the plaintiff as there is no debt owing from the one to the other. *Johnson* v. *Stear* (1) was decided on the principle that the person who sold the goods had some interest in them, and that case is different from the present where the person has only a right of detainer. Erle, C.J., says, "The deposit of the goods in question with the defendant to secure payment of a loan by him to the depositor on a given day, with a power to the defendant to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien." What, therefore, Erle, C.J., says is, assuming that the sale was wrongful, the defendant had an interest in the goods, and the owner can therefore only recover the real damage that he has actually sustained.

The judgment therefore will be entered for the plaintiff in 73*l.*, and for the defendant so far as relates to the harness and carriage.

Judgment accordingly. (2)

Solicitors for plaintiff: *Sharpe & Ullithorne.*

Solicitors for defendant: *Patteson, Wigg, & Co., agents for Oliver Minster, Coventry.*

(1) 15 C. B. (N.S.) 330; 33 L. J. (C.P.) 130.

(2) See now, as to innkeepers' power of sale, 41 & 42 Vict. c. 38.

[IN THE COURT OF APPEAL.]

HOLME *v.* BRUNSKILL.

1877
June 7.

Principal and Surety—Discharge of Surety by Alteration of the Guaranteed Contract—Materiality of Alteration in Contract between Principals—Landlord and Tenant—Surrender of part of Demised Premises—Notice to quit.

The plaintiff having agreed to let to G. B., as yearly tenant, a farm, including certain hill pastures and a flock of 700 sheep, the defendant gave the plaintiff a bond to secure the re-delivery to him at the end of the tenancy of the flock in good order and condition. In November the plaintiff gave G. B. a notice to quit, which was ineffectual to determine the tenancy at the expiration of the then current year. G. B. objected to the insufficiency of the notice, and on the 8th of April entered into an agreement with the plaintiff that G. B. should surrender a field to the plaintiff, that G. B.'s rent should be reduced 10*l.*, and the notice to quit should be considered as withdrawn. G. B. then continued tenant of the farm less the field at the reduced rent. In October, 1876, the plaintiff gave G. B. notice to quit on the 10th of April, 1877. On giving up the farm it was ascertained that the flock was reduced in number and deteriorated in quality and value, and the plaintiff sued the defendant on his bond:—

Held, by Brett, Cotton, and Thesiger, L.JJ., that neither the giving of the notice to quit and its withdrawal, nor the surrender of the field and the reduction of the rent, created a new tenancy.

Tayleur v. *Wilden* (Law Rep. 3 Ex. 303) distinguished.

Held, also, by Cotton and Thesiger, L.JJ., Brett, L.J. dissenting, that the contract of the surety was that the flock should be delivered up in good condition together with the farm as originally demised to the tenant; that the surety ought to have been asked to decide whether he would assent to the variation in the terms of the letting, and not having been asked to assent he was discharged from liability.

At the trial the judge left it to the jury to say whether the new agreement with the tenant had made any substantial or material difference in the relation between the parties, as regarded the tenant's capacity to fulfil the condition of the bond:—

Held, by Cotton and Thesiger, L.JJ., Brett, L.J. dissenting, that the question was one which ought not to have been submitted to a jury; that the surety was the sole judge whether it was reasonable that he should remain liable notwithstanding the new agreement.

ACTION on a bond against the defendant as surety. The bond was dated the 18th of March, 1873, and after reciting that the plaintiff had agreed to let to G. Brunskill, from year to year, a farm called Riggindale, and a stock of 700 heath going sheep, as regarded the arable land, from the 2nd of February, 1873; as

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regarded the lands for pasturage and sheep, from the 10th of April, 1873; and as regarded the dwelling-house and buildings from Whitsuntide then next; and after further reciting that the sheep were delivered to G. Brunskill on the 11th of April, 1873, and consisted of the number, species, and quality mentioned in the schedule to the bond, and it had been agreed that G. Brunskill and R. Brunskill, and C. H. Norman, should enter into the bond for the re-delivery of the said sheep or the offspring thereof in manner thereinafter expressed, stated that the condition of the bond was "if the above bounden G. Brunskill should, at the determination of the tenancy, deliver up unto H. P. Holme, along with the said farm and premises, the like number, species, and quality of good and sound sheep as were delivered to the said G. Brunskill as aforesaid;" and "in case the said stock of sheep should, at the determination of the said tenancy, be reduced or deteriorated in number, quality, or value, should pay to H. P. Holme compensation for such reduction or deterioration, to be ascertained by certain arbitrators" in manner therein provided: and "should yearly and every year during the tenancy pay, or cause to be paid, to H. P. Holme by way of rent or interest for the sheep, the sum of 35*l.* by two equal half yearly payments," then the bond should be void.

The statement of claim, after setting out the bond and averring the performance of all conditions precedent, alleged that the tenancy was determined on the 29th of March, 1877; that G. Brunskill did not deliver up to the plaintiff, along with the farm, the like number, species, and quality of good and sound sheep as were delivered to him, nor did he pay compensation for the reduction and deterioration which had been ascertained in the manner provided by the bond, nor did he pay one half year's rent or interest for the sheep from the 10th of April, 1876.

At the trial at the Cumberland Summer Assizes, 1877, before Denman, J., the following facts were proved: The plaintiff was the owner of Riggindale Farm, consisting of 234 acres, and also of a right of pasturing sheep upon the commons and fells adjoining, all of which he had leased to G. Brunskill as tenant on the terms mentioned in the bond. On the 9th of November, 1875, the plaintiff gave to G. Brunskill a notice to quit the farm and lands

"on the 10th of April, 1876, or at the expiration of the year of your tenancy, which shall expire next after the expiration of one half-year from the service of the notice." On the 8th of April, at an interview between the plaintiff and G. Brunskill, the latter declined to accept the notice to quit on the ground that it was bad, and on that day an agreement was entered into between the parties as follows:—"I agree to give up the field called 'Bog,' now in my occupation, to my landlord, my yearly rent to be reduced by 10*l.*, also to give entry to the same on the 10th of April next, and to give up any claim I have to the use of the building known as the 'Stick-barn.'—G. Brunskill."

The notice to quit was then withdrawn, and G. Brunskill then continued tenant of the farm, less the Bog Field, at the reduced rent. On the 5th of October, 1876, the plaintiff gave G. Brunskill a notice to quit on the 10th of April, 1877, which was admitted to be a good notice; before that day G. Brunskill filed a petition for liquidation of his affairs by an arrangement with his creditors, and the trustees of his estate gave up possession of the farm to the plaintiff on the 29th of March, 1877. It was afterwards ascertained, in the manner mentioned in the bond, by arbitrators, that the flock of sheep was reduced in number and deteriorated in value and quality, and they assessed the damages at 132*l.* It was also proved that the Bog Field was a field in which sheep did not usually pasture, but that it was occasionally used for pasturing sheep to the extent of twenty-five at a time being placed on it, and that it was also used during the lambing season; that the giving up the Bog Field would make an appreciable difference to the tenant in the spring, and that it might make a difference of perhaps fifteen in the number of the sheep that the farm would carry, and that it would compel the tenant to find hay either for the cattle or the sheep elsewhere.

The learned judge left it to the jury to say whether the new agreement with the tenant had made any substantial or material difference in the relation between the parties, as regarded the tenant's capacity to do the things mentioned in the condition of the bond, and for the breach of which the action was brought. The jury answered the question in the negative, and the learned judge reserved judgment.

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At the further consideration of the case, it was contended on behalf of the defendant; first, that the arrangement made on the 8th of April, 1876, amounted to a fresh tenancy as from the 10th of April, 1876, and to a surrender by operation of law of the original tenancy, and that the plaintiff could not sue in respect of a deficiency of sheep arising at the expiration of the new tenancy, as not being the tenancy contemplated in the condition of the bond. Secondly, that if the tenancy could be considered as the same there had been such an alteration in the terms of the bargain between G. Brunskill and the plaintiff, and such an alteration in the risk of the sureties, as to discharge them from their obligation. Thirdly, that the question of materiality was not for the jury, but that the judge was bound to hold that the alteration in the tenancy discharged the sureties, without reference to its materialty.

It was contended on behalf of the plaintiff that the tenancy continued until the 10th of April, 1877, varied only in its terms in one particular, but still remaining the same tenancy, and that the alteration in the agreement between G. Brunskill and the plaintiff was immaterial to the liability of the defendant in respect of the breach sued for, and did not increase the risk of the sureties.

Dec. 21, 1877. DENMAN, J., after stating the facts and pleadings, delivered the following judgment:—

In order to decide whether there is an alteration in the risk such as to discharge the surety, I think it is impossible to lay down an absolute rule that in all cases it is for the judge to decide as matter of law, whether the alteration was such as to have that effect or not. There must, I think, be many cases in which the judge would have to take the opinion of the jury upon the question, whether the alteration was of such a character as to affect the surety in any way by substantially or materially altering the risk. By way of example, I think it is impossible to say that if in the present case the evidence were that the landlord and tenant had merely agreed that the landlord should have the exclusive use of a small shed on the premises during the continuance of the tenancy, such an agreement would necessarily discharge the surety. I think it would in that case be a question for the jury at the most,

whether the shed in question was of such importance, whether it played so material and substantial a part, if any at all, in assisting the tenant in keeping up his stock of sheep, as that the depriving himself of it, by allowing the use of it to the landlord, would render him less capable of performing the condition of the bond. In the present case I think that if the same tenancy had continued to exist, it would have been a question for the jury upon the evidence whether the alteration in its terms, so far as it relates to the giving up of the Bog Field, did make any material difference in the risk, in the sense above explained, and the jury having in effect found that it did not, I should not feel myself justified in holding the contrary as matter of law, and on that ground giving judgment for the defendants. The matter was one in its nature far more fit for the consideration of a special jury for the county of Cumberland than for a lawyer, and I cannot even say that I am dissatisfied with the view they took, though I might possibly, perhaps, through ignorance of sheep farming, come to a different conclusion upon the evidence if it had been for me to decide the question.

But as to the other contentions of the defendant, namely, that the contract between the plaintiff and the principal was a different contract, and that the tenancy was a new tenancy after the agreement of March, 1876, I am of opinion that on this ground the sureties are not liable; I think it is impossible to contend that the words "farm and lands called Riggindale" in the recital of the bond, meant anything except Riggindale Farm as it then existed, namely, a farm of 234 acres including the Bog Field, and though in one sense it would still be called Riggindale Farm after the new agreement, I do not think that that fact would justify me in holding that I could reject that part of the recital of the bond as immaterial; on the contrary, I think it was a material part of the bond, and any such alteration of the holding as the diminution of the farm by seven acres, and a reduction of the rent by 10*l.*, however unprejudicial it may in fact have been to the sureties, is on the face of it such an alteration in the agreement between the plaintiff and the principal as necessarily to make it a new and different agreement which, unless assented to by the surety, must discharge him from his obligation. *Whitcher* v. *Hall* (1), and *North*

(1) 5 B. & C. 269.

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Western Ry. Co. v. *Whinray* (1), are strong authorities to this effect, and I do not think that the case of *Sanderson* v. *Aston* (2) is in conflict with those decisions, for it only decides that where the surety undertook generally to be responsible for the conduct of a person as clerk and traveller, without any reference in the bond to the terms of the agreement as to the kind of notice which was to be given by either party, the mere substitution of an agreement for a one month's notice for an agreement for a three months' notice was not sufficient to discharge the surety. In the present case I think it impossible to say that the alteration was not such as to make a new agreement in a particular expressly referred to in the condition of the bond, and therefore within the authorities to constitute an altered contract for the performance of which the sureties had given no undertaking.

I also think that the defendant is entitled to succeed on the ground that the tenancy which was contemplated by the bond ceased by the operation of the notice to quit given in November, 1875, followed by the fresh agreement in April, 1876. The only distinction which was pointed out between the present case and that of *Tayleur* v. *Wildin* (3), which was cited for the defendant (but for which distinction it would be precisely in point), is that in that case the notice which had been given was a good notice to quit on the proper day, given in proper time, whereas in the present case the notice was given too late to be a good notice for the day for which it gave notice to quit. But it would have been available as a notice to quit in the following year, and was not therefore wholly void or necessarily inoperative; and therefore it appears to me, when the landlord and tenant agreed together that as from the day mentioned in that notice, as the day for quitting, the rent should be reduced and a field given up by the tenant, the tenancy became a new tenancy as much or even more clearly than was the case in *Tayleur* v. *Wildin*. (3) I am therefore of opinion that the defendant is not responsible for the deficiency of sheep which existed at the expiration of this new tenancy, or for the non-payment of the amount assessed by the arbitrators in respect of that deficiency. I therefore give judgment for the defendant.

(1) 10 Ex. 77. (2) Law Rep. 8 Ex. 73.
(3) Law Rep. 3 Ex. 303.

The plaintiff appealed.

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May 7. *C. Russell, Q.C.*, and *Dickinson*, for the plaintiff. First, no new tenancy was created between the landlord and tenant, for an alteration in the terms of the holding does not create a new tenancy. In Com. Dig. tit. Surrender (I. 2) it is laid down that if a lessee surrender or accept a new lease of part of the estate, that will operate as a surrender for that part only. So in Bacon's Abrid. tit. Leases (S.) 3, "If tenant for years of land accepts a new lease by indenture of part of the same lands, this is a surrender for that part only, and not for the whole, because there is no inconsistency between the two leases for any more than that part only which is so doubly leased; and though a contract for years cannot be so divided or severed as to be avoided for part of the years, and to subsist for the residue, either by act of the party, or by act in law, yet the land itself may be divided or severed, and he may surrender one or two acres, either expressly or by act in law, and yet the lease for the residue remains entire, whereas in the other case the contract for the whole would be divided, which the law will not allow." An alteration in the rent does not create a new tenancy: *Clarke* v. *Moor*. (1) The case of *Tayleur* v. *Wildin* (2), is distinguishable on the ground that in the present case the notice to quit was inoperative. Secondly, there was not such an alteration in the terms of the contract between the plaintiff and the principal debtor as would discharge the surety. For all practical purposes the contract has no relation to the farm, as to its extent or mode of management. The farm still remained Riggendale Farm, though the rent had been reduced and the Bog Field given up to the landlord; there is a distinction between the farm and its appurtenances; the agreement related only to part of the farm, and the guarantee was only for the re-delivery of the sheep to be pastured on the adjacent commons and fells, and in respect of the rent to be paid for their use. [On this point they cited *Whitcher* v. *Hall* (3); *Petty* v. *Cooke* (4); *North Western Ry. Co.* v. *Whinray* (5); *Skillett* v. *Fletcher* (6); *Hollier* v. *Eyre*. (7)]

(1) 1 J. & Lat. 723.
(2) Law Rep. 3 Ex. 303.
(3) 5 B. & C. judgment of Littledale, J., at p. 277.
(4) Law Rep. 6 Q. B. 790, 795.
(5) 10 Ex. 77.
(6) Law Rep. 2 C. P. 469.
(7) 9 H. L. C. 57.

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Thirdly, that the question of materiality had been properly left to the jury: *Sanderson* v. *Aston.* (1)

Aspinall, Q.C., and *C. Crompton*, for the defendant. First, there was a new letting and a surrender of the premises. There was a surrender of part, and a reduction of rent of the remainder; a creation of a new rent issuing out of a different thing. The concurrence of the two created a new tenancy. *Tayleur* v. *Wildin* (2) is in point. Secondly, when the subject-matter of the contract is specified as the letting of Riggindale Farm, any alteration as to the farm will invalidate the suretyship, because the surety might or might not have continued the suretyship if he had known of the altered circumstances. The Bog Field having been given up to the landlord, the contract in respect of which the suretyship attached was altered, and the surety released, for the tenant did not get what the surety bargained he should get, that is, Riggindale Farm including the Bog Field: *Whitcher* v. *Hall.* (3) Thirdly, whether the giving up of the Bog Field was a reasonable or material alteration, was a question of which the surety was the sole judge: *Polak* v. *Everett.* (4) And the judge was wrong in leaving that question to the jury.

C. Russell was heard in reply.

Cur. adv. vult.

June 7. The following judgments were delivered.

COTTON, L.J. This is an appeal of the plaintiff against a judgment of Denman, J., in favour of the defendant, Robert Brunskill. The action was on a bond for 1000*l.*, dated the 18th of March, 1873, executed by George Brunskill, Robert Brunskill, and others in favour of the plaintiff. The plaintiff was at the date of the bond, and still is, the owner of a farm called Riggindale, and before the execution of the bond he had agreed with George Brunskill to let to him as yearly tenant Riggindale Farm, including certain hill pasture held therewith, and also a flock of 700 sheep, and the bond in which Robert Brunskill joined as surety for George Brunskill, was given to the plaintiff to secure the delivery to him at the end of the tenancy of the flock of

(1) Law Rep. 8 Ex. 73.
(2) Law Rep. 3 Ex. 303.
(3) 5 B. & C. 269.
(4) 1 Q. B. D. 669.

sheep in good order and condition. The material part of the condition of the bond is as follows. [The Lord Justice read the condition.]

On the 9th of November, 1875, the plaintiff gave to George Brunskill a notice to quit the farm, which was in terms, a notice to quit "on the 10th of April, 1876, or at the expiration of the year of your tenancy, which shall expire next after the expiration of one half year from the service of the notice." The notice being served less than six months before the 10th of April, 1876, was ineffectual to determine the tenancy on that day, but was effectual to determine it on the 10th of April, 1877. Before the 10th of April, 1876, George Brunskill and the plaintiff met, and George Brunskill objected to the insufficiency of the notice to quit. Whereupon the plaintiff stated that he did not wish to take the farm from him, but that he wanted part of the farm called the Bog Field, and it was thereupon agreed that George Brunskill should surrender this on the 10th of April then next, and that his rent should from that time be reduced by 10*l.* a year, and that the notice to quit should be considered as withdrawn. This agreement was carried into effect, and George Brunskill continued to hold the remainder of the farm; but early in October following, the plaintiff gave him due notice to quit on the 10th of April, 1877. Before this time arrived George Brunskill got into difficulties and had become insolvent. His trustee, sometime in March, 1877, gave up the farm, and it was then ascertained that the flock referred to in the bond was reduced in number and deteriorated in quality and value; and the action has been brought to recover from the defendant, under his bond, compensation for the diminished value of the flock.

Mr. Justice Denman, before whom the action was tried, gave judgment for the defendant, and against this judgment the plaintiff has appealed.

One ground on which the defendant relied in supporting the judgment was, that his obligation under the suretyship bond had expired before the deficiency arose, that is to say, that by the notice to quit and agreement made as to the surrender of the Bog Field, and the withdrawal of the notice, a new tenancy was created, to which the bond did not apply; and for this he relied on the case

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of *Tayleur* v. *Wildin* (1) as an authority, that under the circumstances, a new tenancy was created; and it was on the authority of *Tayleur* v. *Wildin* (1), that Mr. Justice Denman, as we understand, principally relied, but we are unable to agree with this view. In *Tayleur* v. *Wildin* (1), the tenant continued in the occupation of the farm after the day for which the notice to quit, which was withdrawn, had been effectually given, and the rent for which the surety was sued accrued in respect of the occupation after that day, and the Court considered the continuance of the tenant's possession after that time as a new tenancy, and that the guarantee which applied only to the old tenancy was therefore gone. But in the present case, the tenancy of George Brunskill was, in fact, determined on or before the day when, if the notice to quit had not been withdrawn it would have ended. The deficiency and deterioration of the flock therefore occurred at the determination of the very tenancy to which the bond referred. It was, however, argued that the effect of giving up the Bog Field, must be a surrender of the old tenancy. But we are of opinion that this cannot be maintained, and that notwithstanding the surrender to a landlord of part of the land demised, the former tenancy of the remainder of the farm still continues.

It was contended by the defendant, that even if there was a continuance of the old tenancy the effect of the surrender of the Bog Field was to discharge him as surety from all liability. The Bog Field contained about seven acres, and the jury, in answer to a question left to them, at the trial, found that the new agreement with the tenant had not made any substantial or material difference in the relation between the parties, as regards the tenant's capacity to do the things mentioned in the condition of the bond, and for the breaches of which the action was brought. The plaintiff's contention was that this must be treated as a finding that the alteration was immaterial, and that, except in the case of an agreement to give time to the principal debtor, a surety was not discharged by an agreement between the principals made without his assent, unless it materially varied his liability or altered what was in express terms a condition of the contract.

In my opinion this contention on behalf of the plaintiff cannot

(1) Law Rep. 3 Ex. 303.

be sustained. No doubt, there is a distinction between the cases, which have turned on the creditor agreeing to give time to the principal debtor, and the other cases. Where a creditor does bind himself to give time to the principal debtor, he with an exception hereafter referred to, does deprive the surety of a right which he has, that is to say of the right at once to pay off the debt which he has guaranteed, and to sue the principal debtor, and without inquiry whether the surety has, by being deprived of this right, in fact suffered any loss, the Courts have held that he is discharged. The exception to which I have referred is, where the creditor on making the agreement with the principal debtor expressly reserves his right against the surety, but this reservation is held to preserve to the surety the right above referred to, of which he would be otherwise deprived. The cases as to discharge of a surety by an agreement made by the creditor, to give time to the principal debtor, are only an exemplification of the rule stated by Lord Loughborough in the case of *Rees* v. *Berrington* (1): "It is the clearest and most evident equity not to carry on any transaction without the knowledge of him [the surety], who must necessarily, have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him."

The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding

(1) 2 Ves. J. 540.

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the alteration, and that if he has not so consented he will be discharged. This is in accordance with what is stated to be the law by Amphlett, L.J., in the *Croydon Gas Company* v. *Dickenson* (1).

The plaintiff, in support of his contention, that having regard to the finding of the jury, the surety was not discharged, relied on various dicta to the effect that any material change in the contract between the principals will discharge the surety. Even if by these expressions the judges intended to state that to have the effect of releasing the surety the alteration must be material, it does not follow that they intended to lay down that no alteration would discharge the surety unless the jury in an action to enforce his liability, held it to be material, or to express any opinion at variance with the rule laid down by me. The case of *Sanderson* v. *Aston* (2), was specially relied on by the plaintiff. But Martin, B., though he did not formally dissent from the decision of the majority of the Court, was not satisfied with the judgment; and if the decision is to be considered as based on the reason given by Pollock, B., that the Court was entitled to consider whether the alteration was material, it cannot, in our opinion, be sustained.

In the present case, although the Bog Field contained seven acres only, yet it cannot be said to be evident that the surrender of it could not prejudicially affect the surety. Some of the witnesses for the plaintiff admitted that it was occasionally used for pasturing, that its loss would be appreciable in the spring, and that it might make a difference of fifteen in the number of the sheep which the farm would carry.

The case may also be considered in another point of view. The bond given by the defendant the surety, was to guarantee the delivery up of the flock of sheep therein referred to at the determination of the tenancy of the Riggindale Farm, which in our opinion, must mean Riggindale Farm as then demised to George Brunskill, and the bond certainly implied that he should continue to hold the farm as then demised till the flock was given up. The contention of the plaintiff, if it could be supported, would make a variation in this contract, as to the materiality of which there is at least a doubt, and would make the defendant liable for a deterioration of the flock during the time when the tenant held

(1) 2 C. P. D. at p. 51. (2) Law Rep. 8 Ex. 73.

a smaller farm than that contemplated by the contract of the surety.

The plaintiff's counsel relied on some observations made by Lord Cottenham in the case of *Hollier* v. *Eyre*. (1) But, in fact, those observations are in favour of the defendant and not of the plaintiff. What Lord Cottenham says is, "the surety will be left to judge for himself between his original undertaking and another substituted for it, but that is not the case where the contract remains the same, though part of the subject-matter is withdrawn from its operation." In this case, as already pointed out, the original contract of the surety was that the flock should be delivered up in good condition, together with the farm, as then demised to the tenant. No part of that which was guaranteed was ever withdrawn from the operation of the bond. But the plaintiff attempts to substitute for the contract that the flock should be given up in good condition, with the farm, as then demised, a contract that it should be delivered up in like condition with a farm of different extent. In my opinion the surety ought to have been asked to decide whether he would assent to the variation. He never did so assent, and in my opinion was discharged from liability, notwithstanding the finding of the jury, inasmuch as in my opinion the question was not one which ought to have been submitted to them.

Lord Justice Thesiger concurs in this judgment.

BRETT, L.J. I speak with great deference when I say I cannot bring my mind altogether to agree with this judgment, and I feel bound to observe that I arrive at another view than that which has been expressed. As to the first part of the judgment I entirely agree. I do not think there was any new tenancy, and I ground that view on the fact of the finding of the jury, amongst other things, that the alteration was immaterial. It is the latter part of this view with which I cannot agree. In the first place, this case comes before us fettered by certain rules. We are bound to observe that it is a direct appeal from the decision of my Brother Denman, after a trial by jury; we are, therefore, not at liberty to ask whether the question he left was left in proper

(1) 9 H. L. C. 57.

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form. There cannot be a motion here for misdirection, and we are not at liberty to say that the finding of the jury was contrary to the evidence. It is a general rule that we have no right to look at the verdict, but accept it according to its ordinary construction. I find the question left to the jury was, whether the new agreement with the tenant, which we are told did not alter the tenancy, made a substantial or material difference in the relation between the parties as to the tenant's capacity to do the things mentioned in the bond, and for breach of which the action was brought. They not only found that, but my Brother Denman says that the matter is far more fit for the consideration of a jury of the county of Cumberland than for a lawyer, and he cannot say that he is dissatisfied with their view. Therefore there is the finding of the jury with the assent of the judge. If it were necessary to give an opinion, considering I have not an intimate knowledge of these things, but from what I know of Cumberland farmers, so far from dissenting from the opinion of the jury, I think it is a substantial finding. When one remembers how many views are taken as to farms in Cumberland, I should be inclined to agree with the jury and say it did not make any material difference. We are bound by that finding, and can act in conformity with it. Where there is a suretyship bond, and there are some alterations in the contract or relation of the parties under the bond as to guaranteeing its performance, the question is whether the alteration is not material or substantial, and whether the surety is released. I cannot bring my mind to think he is, for the law takes no notice of alterations that are neither material nor specific. The proposition of law as to suretyship to which I assent is this, if there is a material alteration of the relation in a contract, the observance of which is necessary, and if a man makes himself surety by an instrument reciting the principal relation or contract, in such specific terms as to make the observance of specific terms the condition of his liability, then any alteration which happens is material; but where the surety makes himself responsible in general terms for the observance of certain relations between parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract. My opinion is in accordance with the finding of the

jury, and it will be most dangerous in this particular case to put ourselves in the place of a jury and because we think seven acres may make a difference, or 10*l.* a year may make a difference, to set aside the finding of the jury, which is that neither one is material or substantial. I think the surety is not released. The doctrine of the release of suretyship is carried far enough, and to the verge of sense, and I shall not be one to carry it any further.

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Judgment affirmed.

Solicitors for plaintiff: *Johnston & Harrison, for Harrison & Little, Penrith.*

Solicitor for defendant: *Arnison, Penrith.*

EX PARTE BRADLAUGH.

June 6.

Obscene Book, Order for Destruction of—20 & 21 *Vict. c.* 83, *s.* 1—*Absence of Jurisdiction*—*Certiorari taken away*—2 & 3 *Vict. c.* 71, *s.* 49—*Metropolitan Police Courts.*

A section in an Act of Parliament taking away the certiorari held not to apply in the case of a total absence of jurisdiction.

An order by a magistrate for the destruction of obscene books under 20 & 21 Vict. c. 83, s. 1, is bad if it merely states that the magistrate was satisfied that the books were obscene, but not that he was satisfied that the publication of them would be a misdemeanour, and proper to be prosecuted as such.

IN this case the applicant in person had obtained a rule nisi for a certiorari to bring up an order of a metropolitan magistrate, under 20 & 21 Vict. c. 83, for the destruction of certain books of which the applicant claimed to be the owner, as obscene publications, on the ground that the order did not shew any jurisdiction on the face of it, because it did not state that the magistrate was satisfied that the publication of the books would be a misdemeanour, and proper to be prosecuted as such.

The order was in substance as follows: It recited that complaint had been made by John Green to Mr. Flowers, one of the metropolitan police magistrates, sitting at Bow Street, within the metropolitan police district, that he had reason to believe that certain obscene books were kept by Edward Truelove, at his shop No. 256, Holborn, in the county of Middlesex, within the metropolitan

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police district, for the purpose of sale or of being otherwise published for the purposes of gain; that the magistrate being satisfied that the belief of the said John Green was well founded, and that the publication of the books was a misdemeanour, proper to be prosecuted as such, thereon issued his warrant pursuant to 20 & 21 Vict. c. 83, for the seizure of the books under that statute: that certain books being copies of a work called the Fruits of Philosophy, kept for the purpose of sale, or of being otherwise published for the purpose of gain, had been seized and brought before Sir J. T. Ingham, one of the metropolitan police magistrates, sitting at Bow Street; that he had issued a summons to the said Edward Truelove, as occupier of the said shop, to appear and shew cause why the books should not be destroyed, and that the applicant appeared before Mr. Vaughan at the hearing, and claimed to be the owner of the books. The order then proceeded to state that the magistrate having examined the said books and duly considered the premises, and being satisfied that the said books so seized were obscene, did order their destruction. (1)

(1) 2 & 3 Vict. c. 71 (an Act for Regulating the Police Courts in the Metropolis), s. 49, enacts that no information, conviction, or other proceeding before or by any of the said magistrates, shall be quashed or set aside, or adjudged void or insufficient for want of form, or be removed by certiorari into Her Majesty's Court of Queen's Bench.

20 & 21 Vict. c. 83, s. 1, provides that "it shall be lawful for any metropolitan police magistrate, or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them, on oath, that the complainant has reason to believe, and does believe, that any obscene books, &c., are kept in any house, shop, &c., with the limits of the jurisdiction of any such magistrate or justices for the purpose of sale or distribution, &c., or being otherwise published for the purposes of gain, &c., &c., and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be misdemeanour, and proper to be prosecuted as such," to issue a warrant to search such house, shop, &c., and seize all such books, &c., as aforesaid, found in any such house, shop, &c., and to carry all the articles so seized before the magistrate or justices issuing the warrant, or some other magistrate or justices exercising the same jurisdiction. The section goes on to provide that such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house, shop, &c., to appear within seven days to shew cause why the articles seized should not be destroyed; "and if such occupier, or some other person claiming to be the owner of the said articles, shall not appear within the time aforesaid, or shall appear, and the magistrate or justices shall be satisfied that such articles, or any of them, are of the

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Besley and *Tickell* shewed cause. The certiorari is taken away by the Act regulating the police courts in the metropolis, 2 & 3 Vict. c. 71, s. 49.

By 12 & 13 Vict. c. 45, s. 7, the order may be amended by the Court on the return to the certiorari, if sufficient grounds were in evidence before the magistrate upon which it might have been correctly drawn up in the first instance. The defect in the order is pure matter of form. The magistrate finds that the books were obscene, and obviously it was meant by implication that they were the species of obscene books that were the proper subject of a prosecution for misdemeanour. Every reasonable intendment is to be made in favour of an order of justices: *Rex* v. *Clayton*. (1)

It is not unreasonable to construe this order as stating inferentially that the magistrate was satisfied of the existence of the requisites of jurisdiction. It states that the magistrate who issued the warrant of search was satisfied that the books were obscene, and the fit subject of a prosecution for misdemeanour, and upon such books being produced before the magistrate who makes the order, he finds that they are obscene, and orders their destruction. By reasonable intendment that must mean that he acts upon a similar opinion to that of the first magistrate. His finding must be coupled with the previous recital.

The applicant, who appeared in person, was not called upon to support the rule.

COCKBURN, C.J. The Act of Parliament makes the magistrate's jurisdiction dependent upon two conditions, first, that the publication must be obscene, and secondly, that it must in the magistrate's judgment be such as is a misdemeanour and proper to be prosecuted as such. It is not enough that it should be obscene. If the legislature had intended that it should be subject to destruction

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character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal as hereinafter mentioned be given."

(1) 3 East, 57.

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merely on the ground of its being obscene, there would have been no meaning in inserting the additional provision as to its being a proper subject for prosecution as a misdemeanour. The insertion of the provision shews that the intention was that the enactment should not take effect when the additional element of fitness for prosecution was wanting. The order now before us is defective in that it omits an essential element of jurisdiction, viz., the statement that the magistrate was of opinion that these books were the proper subject of a prosecution for misdemeanour. The procedure prescribed by the section is as follows. If a complaint is made stating that the complainant believes that an obscene publication is kept for the purposes of sale, and the magistrate is satisfied that such publication amounts to a misdemeanour proper to be prosecuted, then, and then only, he is to issue a warrant for the seizure of such publication. When the seizure has taken place a summons is to be issued to the party who occupies the premises where the publication has been seized, in order that he may shew cause against its destruction. When the matter comes before the magistrate upon the summons he must also be satisfied, on the production before him of the publication, that it is of the character described in the warrant; that is to say, not only that it is obscene, but also that it amounts to a misdemeanour proper to be prosecuted. It is, therefore, essential to his jurisdiction that he should be so satisfied. Here the magistrate who issued the warrant is stated to have been satisfied that the books were not only obscene, but that they also formed the proper subject of a prosecution for misdemeanour, and therefore the warrant is correct in point of form; but when we come to the order for their destruction, that omits to state that they were the proper subject of a prosecution for misdemeanour, but finds merely that they were obscene. The order, therefore, does not state the existence of matter that is essential to the jurisdiction. It was contended that the certiorari is taken away by 2 & 3 Vict. c. 71, s. 49. I entertain very serious doubts whether that provision does not apply only to matters in respect of which jurisdiction is given by that statute, and not to matters in which jurisdiction is given by subsequent statutes; but it is not necessary to deal with that point. This is an objection founded upon an absence of jurisdiction

appearing on the face of the order; and I am clearly of opinion that the section does not apply when the application for the certiorari is on the ground that the inferior tribunal has exceeded the limits of its jurisdiction. It may possibly be that when this order is brought before us on certiorari, the 7th section of 12 & 13 Vict. c. 45, may enable us, if satisfied that the necessary ingredients of jurisdiction existed, to cure the defect; but it is unnecessary to pronounce any opinion on that now. At present the only question is whether the writ is to issue. I am of opinion, for the reasons I have stated, that the rule should be absolute for a certiorari.

MELLOR, J. I am of the same opinion. It is well established that the provision taking away the certiorari does not apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question. The Act provides that if a magistrate is satisfied that the book is obscene and the fit subject of a prosecution for misdemeanour he may issue a warrant for its seizure, but that is only preliminary to the order for its destruction; and in order that it may be legally destroyed the magistrate before whom it is produced, before ordering its destruction, must, upon its production before him, form an entirely distinct and independent judgment that it is not only obscene, but the proper subject of a prosecution for misdemeanour. He is not to take it for granted that such is the case on the strength of the judgment of the magistrate who issued the warrant. The order omits to state that the magistrate who made it was satisfied that the books ordered to be destroyed were the proper subject of a prosecution, and therefore the order on the face of it shews an absence of jurisdiction.

Rule absolute.

Solicitors for complainant: *Collette & Collette.*

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July 2.

[IN THE COURT OF APPEAL.]

HORNE *v.* ROUQUETTE.

Bill of Exchange—Indorser and Indorsee—Indorsement Abroad—Notice of Dishonour by Non-acceptance.

A bill of exchange drawn in England and payable in Spain, was indorsed in England by the defendant to the plaintiff, who indorsed it to M., residing in Spain. Acceptance having been refused, a delay of twelve days occurred before M. wrote to inform the plaintiff of the dishonour. On receipt from M. of the notice of dishonour, the plaintiff gave immediate notice to the defendant. No notice of dishonour by non-acceptance is required by the law of Spain:—

Held, that the plaintiff was entitled to recover the amount of the bill.

APPEAL of the defendant from the judgment in favour of the plaintiff by Lord Coleridge, C.J., at the trial without a jury.

The facts are sufficiently stated in the judgments of Brett and Cotton, L.JJ.

Feb. 1, 2. *Benjamin, Q.C., Murphy, Q.C.* (*Edwyn Jones* with them), for the defendant. The right to sue in this case depends upon the law of England and not of Spain; and therefore the action is not maintainable against the defendant who had no sufficient notice of dishonour by non-acceptance. An indorser is liable according to the law of the country where he contracts: *Mellish* v. *Simeon* (1); *Allen* v. *Kemble* (2); *Gibbs* v. *Fremont.* (3) The plaintiff's counsel may rely upon *Rothschild* v. *Currie* (4); but the decision in that case has been doubted: *Hirschfeld* v. *Smith* (5), and it does not appear to be approved of in Story on Bills, s. 366, and *Aymar* v. *Sheldon* (6), which bears a strong resemblance in its facts to the present case, is a strong authority to shew that as between indorser and indorsee lex loci contractus must prevail. *Bradlaugh* v. *De Rin* (7) is another illustration of the same principle.

J. Brown, Q.C. (*H. Cowie*, with him), for the plaintiff. The indorsement to Monforte must be considered as having been made

(1) 2 H. Bla. 378.
(2) 6 Moo. P. C. 314.
(3) 9 Ex. 25.
(4) 1 Q. B. 43.
(5) Law Rep. 1 C. P. 340.
(6) 12 Wend. R. 439.
(7) Law Rep. 5 C. P. 473.

in Spain: *Buckley* v. *Hann* (1); *Chapman* v. *Cottrell* (2); *Dunlop* v. *Higgins* (3); *Harris's Case* (4); and therefore no notice of dishonour by non-acceptance was needed. It is the law of the country where the bill is to be paid which determines the rights of the parties to it: Story's Conflict of Laws, ch. 8, ss. 307 a. b. c.; *In re State Fire Insurance Co.* (5); *Suse* v. *Pompe* (6); *Pecks* v. *Mayo.* (7) Although the decision in *Rothschild* v. *Currie* (8) may have been questioned, yet it was recognised as good law in *Rouquette* v. *Overmann* (9), which may be considered as overruling *Mellish* v. *Simeon.* (10) The defendants have relied upon *Bradlaugh* v. *De Rin* (11); but that case is not in point.

Murphy, Q.C., replied.

Cur. adv. vult.

July 2. The following judgments were delivered:—

BRETT, L.J. In this case the plaintiff, as the indorsee, sued the defendant, as indorser. The facts which it becomes material to consider are, that the bill was drawn on the 19th of March, 1874, at Newcastle, by Bryant, Foster, & Co., on Chasserot, in Spain, in favour of the defendant, trading in Spain as Rouquette & Co., the bill being made payable in Spain three months after date. This bill was said to be purchased by the plaintiff in London from the defendant who indorsed it in London to the plaintiff. The plaintiff having written his name on the back of the bill, forwarded it to Monforte, in Spain, who there placed it to account under circumstances which, without referring further to them, I hold made the transaction between the plaintiff and Monforte, an indorsement of the bill by the plaintiff to Monforte, in Spain. Monforte indorsed the bill in Spain to Clavero, who indorsed it also in Spain to O'Connor & Sons. The bill was presented by the holders for acceptance in Spain on the 1st of May, 1874, and was dishonoured. It was protested in Spain for such dishonour on the 2nd of May. Notice of the dishonour by non-

(1) 5 Ex. 43.
(2) 34 L. J. (Ex.) 186.
(3) 1 H. L. C. 381.
(4) Law Rep. 7 Ch. 587.
(5) 32 L. J. (Ch.) 300.
(6) 8 C. B. (N.S.) 538; 30 L. J. (C.P.) 75.
(7) 14 Vermont (Rep.) 33.
(8) 1 Q. B. 43.
(9) Law Rep. 10 Q. B. 525, at p. 542.
(10) 2 H. Bla. 378.
(11) Law Rep. 5 C. P. 473.

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acceptance was sent by Monforte to the plaintiff in a letter written by him in Spain on the 13th of May, and received by them on the 26th of May, in London. No clear explanation was given in evidence of the delay in Spain from the 2nd to the 13th of May. The plaintiff gave notice to the defendant on the 26th of May, so that there was no delay by the plaintiff. The defence was rested on the allegation of a want of notice in due time to the defendant of the dishonour by non-acceptance. It was found as a fact that by the law of Spain no notice of dishonour by non-acceptance need be given.

Upon these facts, if all the transactions on this bill had occurred in England the plaintiff could not have recovered, because of the delay of Monforte in forwarding notice to the plaintiff: but if all had occurred in Spain the plaintiff could have recovered, inasmuch as no notice of dishonour is required in Spain. The question is, what is the law here, where some of the transactions on a bill have occurred in England and some abroad. The bill in this case was what is called a foreign bill, because it was a bill drawn in England to be accepted and paid abroad. But this fact seems to be in this case immaterial; for the same question would have arisen in respect of the other facts if the bill has been an inland bill. The facts which raise the difficulty in this case, are the indorsement to Monforte in Spain, the law of Spain, and the delay of Monforte in giving notice of the dishonour, whilst the first indorsement, that of the defendant to the plaintiff, the indorsement sued on, was made in London, was therefore an English indorsement, and raised an entirely English relation of indorser and indorsee between the defendant and the plaintiff. In order to explain the grounds of my judgment it seems to me useful to consider what the law is, if every transaction on a bill occurs in England, and the reasons on which the law is founded; then we must apply those reasons to the present mixed case. If all the transactions on a bill occur in England, there may be one or more indorsements. If there be only one, and the indorsee presents the bill for acceptance, and it be refused, he gives notice to the drawer of dishonour by non-acceptance. He must give such notice at once; that is to say, if he lives in the same town he must give it so that it is to be delivered on the same day,

or otherwise he must forward it by a post of the following day, or the next practicable day. But there may be several indorsements and the bill be presented for acceptance by the last indorsee. In such case, if the acceptance be refused, the last indorsee, the holder, must give notice of dishonour, but he may give it either only to his immediate indorser, or only to the drawer, or to these and to all the intermediate indorsers. Whatever notice he gives he must give it at once, i.e., within the terms above described. And each indorser, as he receives notice, must, if he would preserve his remedy over, give notice to his indorser, or to all before him, within a similar period after he has himself received notice. If all give due notice, each can recover against his immediate indorser or against any indorser whose name is before his on the bill. But if any one fails to give due notice, no one whose name is before his on the bill is liable to pay him, and none of them are liable to pay each other. If those below him who have failed to give due notice have only given notice to him, or to each other in succession up to him, they cannot recover from any one above him: otherwise if they have given a direct notice to those above him. Now the reasons of this law are these: the primary contract on a bill is that between the drawer and acceptor if the drawee accept; the secondary contracts are those between the drawer and his indorsee and between the different indorsers and their indorsees. Each of those is a direct contract between the parties, and each such contract is governed by the common law. But by the law merchant all those contracts can be transferred, that is to say, the acceptor's with the drawer, the drawer's with his indorsee, and so on, so that any subsequent indorsee may, under certain conditions, sue not only his own indorser but any prior indorser, or the drawer or the acceptor. What the contract is between a subsequent indorsee and any prior indorser other than his own immediate one, or between him and the drawer or the acceptor, whether it is the contract of such prior indorser, the drawer, or the acceptor transferred, or whether it is a new authorized contract between such indorsee and such prior indorser, or the drawer or acceptor, need not be determined in this case. Such a question may be material where the indorsement to a subsequent indorsee is made

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abroad, and he sues a prior indorser, or the drawer or acceptor, whose immediate contract was made in England. But in the present case the contract sued on is one between an indorsee and his immediate indorser. It is necessary to examine what that contract is, and what are the consequences following from it. "The effect of indorsing [a bill] is a conditional contract on the part of the indorser to pay the immediate or any succeeding indorsee in case of the acceptor's or maker's default." (Byles on Bills, 11th ed. p. 3.) "An indorser contracts that if the drawee shall not at maturity pay the bill, he, the indorser, will, on receiving due notice of the dishonour, pay the holder the sum which the drawee ought to have paid, together with such damages as the law prescribes or allows as an indemnity. He also contracts in the case of a bill payable at a future date, that if the drawee refuse to accept on presentment, he will in like manner pay" (p. 151). "Suppose the bill to have been accepted and indorsed for value. The acceptor is the principal debtor, and all the other parties are sureties for him, liable only on his default. But though all the other parties are in respect of the acceptor sureties only, they are not as between themselves merely co-sureties, but each prior party is a principal in respect of each subsequent party. For example, suppose a bill to have been accepted by the drawee and afterwards indorsed by the drawer and by two subsequent indorsers to the holder. As between the holder and the acceptor the acceptor is the principal debtor, and the drawer and indorsers are his sureties. But as between the holder and the drawer, the drawer is a principal debtor, and the subsequent indorsers are his sureties. As between the holder and the second indorser, the second indorser is the principal, and the subsequent, or third, indorser is his surety" (p. 243).

All the contracts raised upon the bill, it is seen, except those with the acceptor, are contracts of suretyship, that is to say, are contracts of indemnity. Probably from this, though perhaps from other more strictly mercantile circumstances, as for the purpose of making other preparations or modifications in business, notice of dishonour is by the law merchant made a condition of the liability of the surety. The contracts of indorsement then between the immediate parties to them are conditional, and are

by way of indemnity. It follows from this last that there can be no valid claim in respect of the indorsement where there is no liability in respect of it. And the two together are the reason why a failure by any indorsee to give due notice of dishonour not only disables him from recovering against his immediate indorser, but disables a prior indorser to him from recovering against his indorser, or a prior indorser to him. The indorsee who has failed to give notice cannot recover, because he has not fulfilled the condition of his contract. The others cannot recover, because, as they cannot be made liable they do not require to be indemnified. For example, the indorser to him who has failed to give due notice is not liable to him, and therefore cannot claim against his own indorser; and therefore, again, such last indorser cannot claim against his indorser, and so on. The description of the contract of the indorser cited from Sir John Byles' treatise, may, therefore, be somewhat more strictly defined. It may be thus stated, "An indorser contracts that if the drawee shall not on presentment accept, or at maturity pay the bill, he, the indorser, will on receiving due notice of the dishonour pay to the person who has a right to claim as holder as against him, if such person though he has given value for has received no value on the bill, or if such person though he did receive value on the bill is liable to pay on the bill, the sum which the drawee ought to have paid together with such damages as the law prescribes or allows as an indemnity."

Within that definition the ultimate indorsee will, if he has given due notice or notices, recover, because though he has given value for the bill, he has received no value on it. Any intermediate indorser will recover, if the notices are in order, because though he received value on the bill when he indorsed it he is made liable on the bill by having to indemnify his indorsee, or a subsequent indorsee. But such intermediate indorser will not be liable if the notices are not in order, because he received value on the bill when he indorsed it and is relieved from liability by defect of notices, and therefore is entitled to no indemnity.

The law and its principles and its application, where all the transactions on the bill are in England, being thus worked out, it

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is necessary to apply them where some indorsement has been made abroad. Every party to a bill knows that by the law-merchant it may be indorsed abroad. He cannot object to its being indorsed abroad. He, by the law merchant, undertakes some liability in respect of such indorsement abroad. The question is, how will he be affected by such indorsement abroad? Such an indorsement raises a contract between the immediate indorser and indorsee. Such an indorsement then raises a foreign contract, and that must be construed according to the law of the country in which it was made. The liability of each of those contracting parties to the other is to be determined by the law of the country in which the contract was made. In this case the liability of the plaintiff to Monforte is therefore to be measured by the law of Spain. The plaintiff then was liable to Monforte, though he gave no notice of the dishonour by non-acceptance. By an indorsement, of which the defendant has no right to complain, which by the law merchant he in effect authorized the plaintiff to make at pleasure, the plaintiff, by reason of the default of the drawee, though he did once receive value on the bill, is liable to pay on the bill. He brings his case within the definition of the defendant's liability to him. It follows that, by the law of England applied to the English contract made between the plaintiff and the defendant, the defendant is liable to the plaintiff.

The rules and their application thus deduced were applied in the case of *Rothschild* v. *Currie* (1) and in *Hirschfeld* v. *Smith* (2). In both these cases, as in this, the contract sued on was an English contract of indorsement, made immediately between the plaintiffs, indorsees and the defendants, indorsers. In both cases there had been subsequent foreign indorsements. In both cases the plaintiffs were, according to the construction of the foreign contracts of indorsement by foreign law, liable to the foreign subsequent indorsers, though they would not have been liable if such indorsers had been English indorsers. In both cases the plaintiffs were held, and I think rightly held, to be entitled to recover. The case of *Gibbs* v. *Fremont* (3) does not raise the

(1) 1 Q. B. 43. (2) Law Rep. 1 C. P. 340.
(3) 9 Ex. 25.

same point. The only question was, whether as against the drawer his contract was a Californian or a Washington contract, and it was held that it was Californian. The case of *Aymar* v. *Sheldon* (1) seems to be in accordance with *Rothschild* v. *Currie* (2).

I am of opinion that the judgment of Lord Coleridge was right, and that the appeal must be dismissed.

BRAMWELL, L.J. I agree with my Brother Brett that this judgment should be affirmed. The indorser of a bill of exchange is on its dishonour bound to pay it to the holder, if he has received due notice from him, and if the holder was bound to pay it to some subsequent indorsee by the law merchant. I agree in thinking that it is immaterial that this was a foreign bill. But it was; and when the defendant indorsed it to the plaintiff he must have known that it would be sent to Spain, and probably transferred by a Spanish indorsement to an indorsee in Spain, with the rights and duties created by the law of Spain. I agree in thinking that the indorsement to Monforte was such an indorsement; but there was a subsequent indorsement by Monforte, in Spain as to which there can be no doubt. On the dishonour being known to the plaintiff he at once, and according to English law, gave notice to the defendant; then was the plaintiff bound to pay the bill to Monforte? He certainly was; because, according to Spanish law, no notice of dishonour is necessary to enable the holder to have recourse to an indorser. It may be that, before an action could be maintained in our courts against an indorser carrying on business and resident in England, some notice must be given; but as by Spanish law none is necessary, it follows that such notice, if necessary here, may be given at any time. As the plaintiff was then liable to Monforte, he is entitled to have recourse to the defendant. *Hirschfeld* v. *Smith* (3) was decided on this principle. There is nothing in Story on Bills to the contrary, nor in the case of *Aymar* v. *Sheldon* (1). *Rothschild* v. *Currie* (2) is a decision the same way, though certainly the reasoning there is not satisfactory.

(1) 12 Wendell, 439. (2) 1 Q. B. 43.
(3) Law Rep. 1 C. P. 340.

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COTTON, L.J. This is an appeal from a decision of Lord Coleridge, giving judgment for the plaintiff in an action brought by him as indorsee of a bill of exchange against the defendant, who had indorsed it to him. The bill was drawn by Bryant, Foster, & Co., merchants carrying on business in England, on M. Chasserot, residing in Spain, where the bill was made payable. It was payable to the order of Messrs. Rouquette & Co., under which name the defendant traded, and he in England indorsed it for value to the plaintiff, who is also a merchant carrying on business in England. The plaintiff indorsed the bill and sent it to a correspondent of his, M. Monforte, who resided at Valencia, in Spain. There was no antecedent agreement between the latter and the plaintiff, which bound Monforte to take the bill. But in fact he did so, and credited the amount to the plaintiff, or otherwise gave him the value of the remittance. The bill was indorsed in Spain by Monforte and subsequently by his indorsee, and it was on the 1st of May presented for acceptance to Chasserot, who refused acceptance. Notice of non-acceptance was given to the plaintiff by Monforte by a letter dated the 13th of May, which was received in London on the 26th of that month, and the plaintiff immediately gave notice to the defendant. The bill was on the 19th of June presented for payment. Payment was refused, and the bill was protested for non payment on the 20th of that month, and the plaintiff on the 30th of July received notice of non-payment, which was given by a letter of Monforte dated the 17th of that month, and the plaintiff on the same 30th of July gave notice of non payment to the defendant. The plaintiff afterwards paid the amount of the bill and expenses to Monforte, and the action was to recover from the defendant the amount so paid. The defence was, that due notice of the non-acceptance and non payment was not given.

There was evidence that by the law of Spain no notice of dishonour was necessary; and Lord Coleridge found as a fact that, having regard to the law of Spain, the notice of dishonour was given within a reasonable time; and the principal question argued was by what law the contract made by the indorsement of a bill of exchange is to be regulated. In my opinion this in no way depends on the place where the bill is made payable. That must

regulate the contract made by the drawee if he accepts the bill, but an indorser does not contract to pay in the place where the bill is made payable, or where the drawee resides; and his liability on the contract which he enters into by his indorsement must, in my opinion, in accordance with the general rule, depend on the law of the place where that contract is made. This is not consistent with the reasoning of Lord Denman when giving judgment in the case of *Rothschild* v. *Currie* (1), that the contract made by an indorser must be governed by the law of the country where the drawee resides and the bill is to be paid. The decision in that case has been doubted (see Byles, J., in *Hirschfeld* v. *Smith* (2) and *Allan* v. *Kemble* (3)); and although the decision may be supported on other grounds, namely, that due notice is such as may be reasonably required under the circumstances of the case, and that the notice was under the circumstances given in a reasonable time (see Erle, C.J., in *Hirschfeld* v. *Smith* (4)), I am unable to agree with the reasons given by Lord Denman in deciding the case.

In this case the indorsement of the defendant was made in England to a person residing in England, and therefore, in my opinion, must be regulated by the law of England. What, then, is the contract made by the indorser of a bill with the indorsee? It is that if the bill is not accepted, or after having been accepted is dishonoured, he will pay him the amount of the bill if it has not been indorsed by his indorsee, or if it has been so indorsed will indemnify him against any liability to a subsequent indorsee in respect of the bill, and according to English law this contract is subject to a condition that due notice of the non-acceptance or non-payment be given to the indorser. There was no delay or default on the part of the plaintiff in giving notice to the defendant, and the question really is, whether under the circumstances the plaintiff was under any legal liability on the bill, or paid the amount in fact paid by him in respect thereof voluntarily and without legal liability.

As there was no antecedent agreement on the part of Monforte to take and give credit for the bill remitted to him by the plaintiff,

(1) 1 Q. B. 49.
(2) Law Rep. 1 C. P. 343.
(3) 6 Moo. P. C. 314.
(4) Law Rep. 1 C. P. 351, 352.

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the contract with Monforte by the indorsement of the bill was not complete till the delivery of the bill to him in Spain: see *Sichel* v. *Borch.* (1) Under these circumstances, where we have to ascertain what condition as to notice of dishonour is to be imported into the contract of indorsement, even if the contract of the plaintiff by his indorsement to Monforte is not to be treated as made in Spain (in which case it would be governed by the law of Spain), in my opinion the law of Spain cannot be disregarded. If the plaintiff was entitled to notice of dishonour, which is a condition implied by English law, as in my opinion he was, I think that in ascertaining what was due notice regard must be had to the law of Spain. Lord Coleridge has found as a fact, and the evidence supports his finding, that having regard to the law of Spain, the notice of dishonour to the plaintiff was given within a reasonable time. The consequence, in my opinion, is that the plaintiff was liable to Monforte on his contract of indorsement, and was liable to make the payments in fact made by him, and is therefore entitled to recover, on the ground that he the plaintiff has performed the condition to which by the law of England the defendant's contract of indorsement is subject, and was liable to make the payment in respect of which he claims to be indemnified.

This in no way decides that one, who has in England indorsed a bill to a person resident in this country, would be liable to the holder of it, who took it by subsequent indorsement in another country, if the English indorser received from this holder such notice only as is required by the law of the foreign country, and not such as is required by the law of England. That question does not arise in the present case.

Judgment affirmed.

Solicitors for plaintiff: *Kearsey, Son, & Hawes.*
Solicitors for defendant: *Lowless & Co.*

(1) 2 H. & C. 954.

[IN THE COURT OF APPEAL.]

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July 2.

BAXENDALE *v.* BENNETT.

Bill of Exchange—Inchoate Instrument—Liability of Acceptor of a Lost Blank Acceptance—Negligence, Evidence of.

The defendant gave H. his blank acceptance on a stamped paper, and authorized H. to fill in his name as drawer. H. returned the blank acceptance to the defendant in the same state in which he received it. The defendant put it into a drawer of his writing table at his chambers, which was unlocked, and it was lost or stolen. C. afterwards filled in his own name without the defendant's authority, and an action was brought on it by the plaintiff as indorsee for value:—

Held, that the defendant was not liable on the bill.

Per Bramwell, L.J., on the ground that there was no estoppel between the parties, which prevented the defendant from setting up the true facts, and if the defendant had been guilty of negligence it was not the proximate or effective cause of the fraud.

Per Brett, L.J., on the ground that after the return of the blank acceptance by H. the defendant had never authorized any one to fill in a drawer's name, and that he had never issued the acceptance intending it to be used.

ACTION commenced on the 10th July, 1876, on a bill of exchange, dated the 11th of March, 1872, for 50*l.* drawn by W. Cartwright and accepted by the defendant, and of which the plaintiff was the holder, and for interest.

At the trial before Lopes, J., without a jury, at the Hilary Sittings in Middlesex, the following facts were proved: The bill, dated the 11th of March, 1872, on which the action was brought, purported to be drawn by one W. Cartwright on the defendant, payable to order at three months' date. It was indorsed in blank by Cartwright, and also by one H. T. Cameron. The plaintiff received the bill from Cameron on the 3rd of June, 1872, and was the bonâ fide holder of it, without notice of fraud, and for a valuable consideration.

One J. F. Holmes had asked the defendant for his acceptance to an accommodation bill, and the defendant had written his name across a paper which had an impressed bill stamp on it, and had given it to Holmes to fill in his name, and then to use it for the purpose of raising money on it. Afterwards Holmes, not requiring accommodation, returned the paper to the defendant in the same state in which he had received it from him. The defendant then

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put it into a drawer, which was not locked, of his writing table at his chambers, to which his clerk, laundress, and other persons coming there had access. He had never authorized Cartwright or any person to fill up the paper with a drawer's name, and he believed that it must have been stolen from his chambers.

On these facts the learned judge found that the bill was stolen from the defendant's chambers, and the name of the drawer afterwards added without the defendant's authority; but that the defendant had so negligently dealt with the acceptance as to have facilitated the theft; he therefore ruled upon the authority of *Young* v. *Grote* (1), and *Ingham* v. *Primrose* (2), that the defendant was liable, and directed judgment to be entered for the plaintiff for 50*l.* and costs.

May 4. *Bittleston* (*Rolland*, with him), for the defendant. The question is whether a blank acceptance, lost by the alleged acceptor, before its delivery to any one, and subsequently filled up by a stranger and put into circulation, can be sued on by a bonâ fide holder for value. No action can be brought on such an instrument, for it is merely an inchoate bill; and there can be no implied authority to any one to make the bill complete, for it was never intended that it should be issued. In Byles on Bills, 11th ed. p. 87, it is said, "without the drawer's signature, a bill payable 'to my order' though accepted is of no force either as a bill of exchange or as a promissory note." *Stoessiger* v. *South Eastern Ry. Co.* (3), and *M'Call* v. *Taylor* (4), are authorities for this proposition. *Young* v. *Grote* (1), and *Ingham* v. *Primrose* (2), will be relied on by the plaintiff, but in those cases the documents were complete. *Awde* v. *Dixon* (5) is in point for the defendant. There is no evidence of negligence on the part of the defendant to make him liable to the plaintiff. On this point *Bank of Ireland* v. *Trustees of Evans' Charities* (6) applies. In that case the trustees having a common seal permitted their secretary to have it in his custody; he fraudulently affixed the seal to a power of attorney, which being presented at the Bank of Ireland certain stock were transferred from the names of the trustees.

(1) 4 Bing. 253.
(2) 7 C. B. (N.S.) 82; 28 L. J. (C.P.) 294.
(3) 3 E. & B. 553; 23 L. J. (Q.B.) 293.
(4) 34 L. J. (C.P.) 365.
(5) 6 Ex. 869.
(6) 5 H. L. C. 389.

It was sought to make the bank responsible for having acted on a power of attorney to which the seal of the trustees had been fraudulently attached. The judge who tried the cause told the jury that, if under the circumstances the trustees had so negligently conducted themselves as to contribute to the loss, the verdict must be for the bank. But Parke, B., in delivering the opinion of the judges in the House of Lords, said, "that the supposed negligent custody of their corporate seal by the trustees in leaving it in the hands of their secretary, whereby he was enabled to commit the forgeries, is not sufficient evidence of that species of negligence which alone would warrant a jury in finding that the plaintiffs were disentitled to insist on the transfer being void—that the negligence which would deprive the plaintiffs of their right to insist that the transfer was invalid, must be negligence in or immediately connected with the transfer itself." So here leaving the blank acceptance in an unlocked drawer in his chambers is not that species of negligence which disentitles the defendant from insisting that the bill is invalid. In *Swan* v. *North British Australasian Co.* (1), Blackburn, J., explains that negligence must be the neglect of some duty cast upon the person guilty of it, and then he adds, "A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but inasmuch as he neglects no duty which the law casts on him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, except in market overt." That passage from the judgment of Blackburn, J., is cited with approbation by Cockburn, C.J., in *Johnson* v. *Credit Lyonnais Co.* (2) On these authorities it is clear that the judge was wrong in ruling that the defendant was guilty of negligence and liable on the bill.

Jeune, for the plaintiff. The defendant having been guilty of negligence, the plaintiff, being a holder for value, is entitled to recover. It is clear law that it is immaterial whether the name of the drawer be added before or after acceptance: *Molloy* v. *Delves* (3); and it is equally clear that it is not necessary that the bill should be drawn by the person to whom it is handed by the

(1) 2 H. & C. at p. 181; 32 L. J. (Ex.) at p. 273.

(2) 3 C. P. D. at p. 42.

(3) 7 Bing. 428.

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acceptor: *Schultz* v. *Astley*. (1) There is, however, no direct authority on the question whether the holder of a bill that has been lost before it has been issued can recover upon it; but there are dicta of learned judges on the point. In *Awde* v. *Dixon* (2) Parke, B., laid it down as a general proposition that a person who puts his name to blank paper impliedly authorizes the filling up to the amount the stamp will cover. In *Swan* v. *North British Australasian Co.* (3) Byles, J., is reported to have said "that where a man loses or parts with his name written on a piece of stamped paper he is responsible to any bonâ fide holder when it is filled up as a promissory note or bill." In *Montague* v. *Perkins* (4) Cresswell, J., puts the very question: "Suppose the defendant had lost his blank acceptance, would he have been liable upon it if the finder, without his authority, had filled it up?" It seems to have been conceded in the argument that he would; in that case the blank acceptance had been filled up after a lapse of twelve years, and and the jury found it had been filled up after the lapse of a reasonable time, nevertheless the acceptor was held liable. *Awde* v. *Dixon* (2) is no authority for the defendant, for it was apparent, on the face of the instrument, that the bill was incomplete. In Byles on Bills, 11th ed. at p. 187, the author seems to be of opinion that the writer of a blank acceptance not delivered, but lost or stolen without any negligence on his part, would not be liable; but in the present case the defendant has been guilty of such negligence as, according to *Ingham* v. *Primrose* (5), would make him liable. In that case the defendant gave the bill to M. to get it discounted, and M., failing to do so, returned it. The plaintiff then tore it in half and threw it into the street. M. picked it up, joined the pieces together and negotiated it. The jury found that the defendant intended to cancel the bill; he was, however, held liable on the authority of *Young* v. *Grote* (6), on the ground that he had led to the plaintiff becoming the holder of it for value. Williams, J., in delivering the judgment of the Court, says: "It is settled law that if the defendant had drawn a cheque and before he had

(1) 2 Bing. N. C. 544.
(2) 6 Ex. 869.
(3) 32 L. J. (Ex.) at p. 278.
(4) 22 L. J. (C.P.) at p. 189.
(5) 7 C. B. (N.S.) 82; 28 L. J. (C.P.) 294.
(6) 4 Bing. 253.

issued it he had lost it, or it had been stolen from him, and it had found its way into the hands of a holder for value without notice, who had sued the defendant upon it, he would have had no answer to the action. So if he had indorsed in blank a bill payable to his order, and it had been lost or stolen before he delivered it to any one as indorsee—see the judgment in *Marston* v. *Allen*." (1) The defendant has been negligent in the custody of the bill, and the plaintiff is entitled to recover.

Bittleston, in reply.

Cur. adv. vult.

July 2. The following judgments were delivered:—

BRAMWELL, L.J. I am of opinion that this judgment cannot be supported. The defendant is sued on a bill alleged to have been drawn by W. Cartwright on and accepted by him. In very truth he never accepted such a bill; and if he is to be held liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do. Is that the case here? Let us examine the facts. The defendant drew a bill (or what would be a bill had it had a drawer's name) without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition, it, not being a bill, was stolen from him, filled up with a drawer's name, and transferred to the plaintiff, a bonâ fide holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed and the drawer's name bonâ fide put by such person. I do not say such person could have recovered on the bill; I am of opinion he could not; but what I wish to point out is that the bill might

(1) 8 M. & W. 494.

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be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to shew this? Why is he stopped? What has he said or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank cheque, with no payee, or date, or amount, and it was stolen, would he be liable or accountable, not merely to his banker the drawee, but to a holder? If so, suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a cheque or bill to the signature, would the signer be liable? I cannot think so. But what about the authorities? It must be admitted that the cases of *Young* v. *Grote* (1) and *Ingham* v. *Primrose* (2) go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument; it has not been got from him by the commission of a crime. This, undoubtedly, is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime.

But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then the *Bank of Ireland* v. *Evans' Trustees* (3) shews under such circumstances there is no estoppel. It is true that was not the case of a negotiable instrument; but those who complained of the negligence were the parties immediately affected by the forged instrument.

(1) 4 Bing. 253.

(2) 7 C. B. (N.S.) 82; 28 L. J. (C.P.) 294.

(3) 5 H. L. C. 389.

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BRETT, L.J. In this case I agree with the conclusion at which my Brother Bramwell has arrived, but not with his reasons. The defendant signed a blank acceptance and gave it to a person who wanted money that he might get it discounted; that person sent the blank acceptance back to the defendant, who put it into a drawer in his room; the room was not a place of general resort, and the drawer into which the acceptance was put was left unlocked; somebody, not a servant of the defendant, stole it, and it was filled up by a different person from him to whom the acceptance was originally given and who had returned it. On these facts, Lopes, J., held that the defendant had been guilty of negligence, and was therefore liable on the bill to the plaintiff.

Bramwell, L.J., says that the defendant is not liable, because if he be guilty of negligence, the negligence is not the proximate or effective cause of the fraud. It seems to me that the defendant never authorized the bill to be filled in with a drawer's name, and he cannot be sued on it. I do not think it right to say that the defendant was negligent. The law as to the liability of a person who accepts a bill in blank, is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover; he does not strictly authorize him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable. Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank notes; but whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used. No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person.

In this case it is true that the defendant after writing his name across the stamped paper sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover the defendant would be liable, because

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he sent it with the intention that it should be acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: the defendant accepts a bill and puts it into his drawer, it is as if he had never issued it with the intention that it should be filled up; it is as if after having accepted the bill he had left it in his room for a moment and a thief came in and stole it. He has never intended that the bill should be filled up by anybody and no person was his agent to fill it up.

Then it has been said that the defendant is liable because he has been negligent; but was the defendant negligent? As observed by Blackburn, J., in *Swan* v. *North British Australasian Company* (1), there must be the neglect of some duty owing to some person—here how can the defendant be negligent who owes no duty to anybody —against whom was the defendant negligent, and to whom did he owe a duty? He put the bill into a drawer in his own room; to say that was a want of due care is impossible; it was not negligence for two reasons, first, he did not owe any duty to any one, and, secondly, he did not act otherwise than in a way which an ordinary careful man would act.

As to the authorities that have been cited; in *Schultz* v. *Astley* (2) the blank acceptance had been filled up by a stranger and a fraud had been committed; nevertheless, the acceptor was held to be liable. There, however, the acceptance had been issued and it was intended that it should be filled up by someone; but Crompton, J., in *Stoessiger* v. *South Eastern Ry. Co.* (3), said that case had gone to the utmost extent of the law. I do not think that the doctrine there laid down ought to be extended. In *Ingham* v. *Primrose* (4) the acceptor of a bill of exchange, with the intention of cancelling it, tore it into two pieces and threw them into the street, they were picked up by the indorser, joined together, and the bill was put into circulation. The acceptor was held liable because, said the Court, although he did intend to cancel it, yet he did not cancel it. It seems to me to be difficult to support that case, and the correct mode of dealing

(1) 2 H. & C. 175; 32 L. J. (Ex.) 273.
(2) 4 Bing. N. C. 544.
(3) 3 E. & B. at p. 556.
(4) 7 C. B. (N.S.) 82; 28 L. J. (C.P.) 294.

with it is to say we do not agree with it. In *Young* v. *Grote* (1) Young left a blank cheque with his wife and in filling up the cheque for fifty pounds the word fifty was written in the middle of the line, ample space being left for the insertion of other words. By a forgery, before the word fifty, the words "three hundred and" were inserted. Notwithstanding the forgery the Court held Young liable. It is said that the case may be upheld on the ground that Young owed a duty to his own bankers, and that he was guilty of negligence in not drawing his cheques on them with ordinary care, but that case does not govern the present, it only applies to cases between bankers and mere customers. In *Bank of Ireland* v. *Evans' Charity Trustees* (2), Parke, B., in delivering the opinion of the judges in the House of Lords remarks, with reference to *Young* v. *Grote* (1), "In that case it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer, having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment." He then gives instances in which a person would not be liable and which govern the present case. "If a man should lose his cheque book or neglect to lock his desk in which it is kept and a servant or stranger should take it, it is impossible, in our opinion, to contend that a banker paying his forged cheque would be enabled to charge his customer with that payment. Would it be contended that, if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale and so be disentitled to sue for their conversion on a demand and refusal?" Lord Cranworth, speaking of *Young* v. *Grote* (1), says that case went upon the ground, whether correctly arrived at in point of fact is immaterial, that in order to make negligence a good answer there must be something that amounts to an estoppel or ratification—"that the plaintiff was estopped from saying that he did not sign the cheque," and then he says the doctrine of ratification is well illustrated by *Coles* v. *Bank of England* (3). I think the observations made by the

(1) 4 Bing. 253. (2) 5 H. L. C. 389. (3) 10 A. & E. 437.

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Lords in the case of *Bank of Ireland* v. *Evans' Charity Trustees* (1) have shaken *Young* v. *Grote* (2) and *Coles* v. *Bank of England* (3) as authorities. In the present case I think there was no estoppel, no ratification, and no negligence, and that the defendant is entitled to our judgment.

BAGGALLAY, L.J., concurred that the judgment ought to be entered for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *George Kirby & Millett.*
Solicitor for defendant: *G. Reader.*

[IN THE COURT OF APPEAL.]

July 2.

PORTEUS AND OTHERS *v.* WATNEY AND OTHERS.

Ship and Shipping—Charterparty—Bill of Lading—Demurrage—Liability to Shipowner of Consignee prevented from discharging his Goods by the Delay of other Consignees.

A charterparty entered into between the plaintiffs, and B. & Co. for the conveyance of grain from C. to L., stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at 35*l.* a day. The vessel having been loaded, one of the bills of lading was indorsed to the defendants. The defendants' grain was stowed at the bottom of the main hold, and that of the other shippers on the top of it. The bill of lading, indorsed to the defendants, contained the words "paying freight for the same goods and all other conditions as per charterparty." Owing to the consignees, whose grain was placed on the top of the defendants', having failed to take away their goods within the lay days, the defendants were unable to obtain delivery of their grain, and three days' demurrage was incurred:—

Held, affirming the judgment of Lush, J., that the defendants were liable for the demurrage, although they were prevented from getting their goods by the delay of other consignees.

ACTION to recover 105*l.* for three days' demurrage of the steamer *Stamford* at the port of discharge.

At the trial before Lush, J., at the Hilary Sittings in London, the following facts were proved:—A charterparty was entered into between the plaintiffs, the owners of the *Stamford*, and Brand &

(1) 5 H. L. C. 389. (2) 4 Bing. 253.
(3) 10 A. & E. 437.

Co., for the conveyance of a cargo of grain from Cronstadt to London, and by which it was stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage over and above the said loading and delivery days at 35*l.* day by day. The captain to sign bills of lading as presented without prejudice to the charterparty, but at not less than chartered rate, and to have an absolute lien on the cargo for all freight, dead freight, and demurrage. The cargo to be brought and taken from alongside the ship at merchant's risk and expense.

The vessel took on board a full cargo of grain from several shippers, and a portion of it was consigned to the defendants. The defendants' grain was stowed at the bottom of the main hold, and that of other shippers on the top of it. Bills of lading for portions of the cargo were given to the several shippers, and one of which, for a part of the cargo, was indorsed to the defendants, and contained the words, to be delivered to order or to assigns "on paying freight for the said goods and all other conditions as per charterparty." Seven days had been consumed at the port of loading, so that seven working days remained for unloading at the port of discharge. Owing to the consignees of the portions of cargo placed on the top of the grain of the defendants having failed to take away their goods in proper time, the defendants were unable to obtain delivery of their grain, and in consequence demurrage amounting to three days was incurred. The learned judge directed the judgment to be entered for the plaintiffs for 10*5l.* and costs. (1)

May 4. *Butt, Q.C.*, and *Mathew*, for the defendants, contended that the words in the bill of lading "paying freight for the same goods and all other conditions as per charterparty" must receive some limited construction; that it would be too extensive a construction to hold that they put the consignee in the place of the charterer, for it never could have been intended to make him liable to every dispute between the charterer and the shipowner. The words therefore ought to be limited to conditions having reference to the particular goods.

(1) Ante, p. 227.

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May 16, 17. *A. L. Smith*, and *R. T. Reid*, for the plaintiffs, contended that the charterparty was incorporated in the bill of lading, and that the consignee was bound before he received delivery of his goods to fulfil the conditions referred to besides the payment of freight.

The cases cited in the arguments are mentioned in the judgments.

Cur. adv. vult.

July 2. The following judgments were delivered.

THESIGER, L.J. I am of opinion that this appeal should be dismissed.

11 QBD 436

By the terms of the bill of lading, the consignee is only to receive his goods on the payment of freight for them and on the fulfilment of all other conditions as per charterparty. Among those conditions is that by which the shipowner stipulates for payment of demurrage at a fixed rate, in the event of the vessel carrying the goods being detained beyond the working days allowed by the charterparty. The language used, if construed according to its natural meaning, imports a liability on the part of the consignee for demurrage, co-extensive with the liability of the charterer, and the Court ought not to depart from what is the natural meaning of words selected by the parties to the contract, unless compelled by strong reasons or distinct authority. In *Wegener* v. *Smith* (1) the words of the bill of lading were substantially the same as here, namely, "against payment of the agreed freight and other conditions as per charterparty," and the construction put upon them was that to which I have referred. It is true, as was pointed out by the later case of *Smith* v. *Sieveking* (2), that there the demurrage sued for had arisen from the default of the defendant, but this fact was not even alluded to in the judgments of the learned judges who decided the case, and clearly was not the ground of the decision. In *Gray* v. *Carr* (3), the words were "he or they paying freight and all other conditions or demurrage (if any should be incurred), for the said goods

(1) 15 C. B. 285; 24 L. J. (C.P.) 25.

(2) 4 E. & B. 945; 24 L. J. (Q.B.) 257.

(3) Law Rep. 6 Q. B. 522.

as per the aforesaid charterparty," and although the Court of Exchequer Chamber decided against the shipowner, on the ground that the claim set up by him for damages for short loading was not provided for under the term "dead freight" used in the charterparty, so that the case is not a direct authority upon the point under consideration, yet, inasmuch as the majority of the Court consisting of four out of six judges, were of opinion that under the words "all the conditions as per the aforesaid charterparty," the holder of the bill of lading would have been liable for dead freight if any had been payable, the case at least, indirectly confirms the authority of *Wegener* v. *Smith*. (1) The cases of *Chappel* v. *Comfort* (2), *Fry* v. *Chartered Mercantile Bank of India* (3); and *Smith* v. *Sieveking* (4), which have been cited on behalf of the defendant in the present case, so far from weakening the authority of *Wegener* v. *Smith* (1), appear to me to tend still further to strengthen it. In each of them the reference to the charterparty contained in the bill of lading was either expressly, by the use of the words "freight as per charterparty," as in the two first cases, or impliedly by the use of the words "paying for the said goods as per charterparty," as in the last case, limited to the condition in the charterparty relating to freight, and was held to be made simply for the purpose of ascertaining the rate of freight, and not for the purpose of imposing an obligation upon the holder of the bill of lading to perform the conditions of the charterparty generally. In none of these cases was any doubt thrown upon the correctness of the decision in *Wegener* v. *Smith*. (1) While in *Smith* v. *Sieveking* (4) it is expressly approved of, and the Court in referring to the language of the bill of lading, says: "This plainly indicated to the consignee that before he was entitled to the delivery of the goods he was bound to make a payment beyond the freight; and there was a reference to the charterparty for some condition to be performed beyond the payment of freight." That condition was payment of demurrage, and the bill of lading was construed as if it had expressly made the payment of demurrage a condition on the performance of which the goods were deliverable. The consignee

(1) 15 C. B. 285; 24 L. J. (C.P.) 25.

(2) 10 C. B. (N.S.) 802.

(3) Law Rep. 1 C. P. 689.

(4) 4 E. & B. 945; 24 L. J. (Q.B.) 257; 5 E. & B. 589.

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accepting the goods under such a bill of lading could not escape the payment of demurrage by denying his liability to pay it. The true result of the authorities therefore is, that a bill of lading in which the words "and all other conditions as per charterparty," follow the expression "on paying freight," or "paying for the said goods," or similar expressions, imports a liability on the part of the consignee of goods under the bill of lading to pay the demurrage stipulated for by the terms of the charterparty to which it refers.

It is said, however, on the part of the defendants that the present case is distinguishable from those of *Wegener* v. *Smith* (1), and *Gray* v. *Carr* (2), by the fact that in them the bill of lading comprised the whole cargo, while here it comprises only a portion of the cargo; but with the exception of an observation of Maule, J., made in the course of the argument in the former case, I can find nothing which would justify me in supposing that such a distinction exercised any material effect upon the decisions in those cases, and the absence of any reference in the judgments to it is an argument against its existence. For myself I feel a difficulty in seeing how the construction of a bill of lading, which on its face may not, and in many cases will not, prove the fact, whether the goods to which it refers do or do not constitute the whole cargo of a chartered ship, can upon a point like that under consideration alter, according to whether the parol evidence establishes that fact in the affirmative or negative. One view by which it was suggested that this difficulty is met, is that the construction is not altered, but the conditions of the charterparty are to be read into the bill of lading, not absolutely, but with reference to the goods which are the subject of it, and that just as the freight, if regulated by the charterparty freight, is proportionate to the goods carried under the bill of lading, so the demurrage is to be divided among the consignees in proportion to the value of their goods. But this view by attempting to remove one difficulty raises another, for it would if adopted be impossible of being worked out, as a matter of commercial practice. It is impossible to suppose that a shipowner whose ship has been detained beyond the lay days could in practice assert liens, or bring actions against all the bill of lading holders, for proportionate amounts of demurrage ascertained by a sort of

(1) 15 C. B. 285; 24 L. J. (C.P.) 25. (2) Law Rep. 6 Q. B. 522.

average statement; and the result would therefore be that a clause in the bill of lading, which would appear to have been inserted for the very purpose of securing the liens to which the shipowner is entitled by the charterparty, would become practically inoperative. Another view presented is that the working days under the charterparty must be allotted among the consignees of the cargo, in proportion to the amount of the cargo to be respectively received by them, so that if in the present case there had been seven consigneees of the cargo in equal portions, then there being seven working days left for unloading at the port of discharge, each consignee would be entitled to one day for unloading, and would only be liable for demurrage if he exceeded, and to the extent that he exceeded, that one day. But this view is as unpractical as the other to which I have just referred, and would if adopted lead to the same consequence. There is in reality no practicable middle course between the right of the shipowner to treat each consignee as liable in solido for the demurrage secured by the charterparty, and the right of the bill of lading holder to have his goods entirely freed from the condition as to demurrage contained in the charterparty. And even if a middle course were practicable, the parties to the bill of lading contract could only be held to have adopted it by giving a strained interpretation to the words used by them. But then it has been urged upon us that the inconvenience and hardship, which would arise if the consignee of a small parcel of goods were held liable for the whole demurrage under the charterparty, afford a strong practical argument against the construction of the bill of lading contended for by the plaintiffs. This might be so if it were possible to construe the bill of lading so as to exclude altogether the condition as to demurrage, but if that condition must be included, as for the reasons I have already given I think it must, and the words by which it is included in their natural meaning import, as I also think they do, that the condition is to be read as if it was introduced into the bill of lading, while any other construction of the bill of lading would lead to an utterly impracticable result, the argument founded upon the alleged inconvenience and hardship to the consignee becomes of little force. It is no doubt a startling consequence if by the construction which this Court puts upon the bill of lading—as it has been suggested,

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and as I understand Brett, L.J., holds—the shipowner can recover the demurrage against all as well as against any one or more of the consignees, so that he may be paid over and over again. If the words of the charterparty are to be read in to the bill of lading in such a manner as that reference to the charterparty and to what is done under the charterparty, except for the purpose of reading the words in, cannot be made, such a consequence would follow; but in that case, *Leer* v. *Yates* (1) becomes an authority that notwithstanding that consequence the consignee is liable for the entire demurrage, and *Leer* v. *Yates* (1), notwithstanding the dissent from the doctrine laid down in it expressed by Lord Tenterden in the cases of *Rogers* v. *Hunter* (2), and *Dobson* v. *Droop* (3), still stands as an authority.

But, on the other hand, without taking upon myself to express an opinion upon a point which is not directly before us, especially in the face of the opinion of Brett, L.J., I must at least say that I do not think it altogether clear that when a bill of lading stipulates that a consignee under it is to have his goods on payment of freight and on the performance of all other conditions of the charterparty; and, in point of fact, all demurrage due under the charterparty has been paid to the shipowner by some other consignee under a similar bill of lading, so that the condition in the charterparty as to demurrage has been performed, although not by the particular consignee; that fact would not constitute in equity, if not at law, a defence to an action for demurrage brought against the first consignee. Be this how it may, I feel bound by the language of the contract between the parties in this case to hold that the plaintiffs were entitled to recover against the defendants the demurrage claimed, and that consequently the decision in their favour by the learned judge in the Court below was right and should be affirmed.

COTTON, L.J. I agree in the decision, and also in the reasons which have been given by Thesiger, L.J., for the conclusion at which he has arrived. The question is, what is the contract the parties have entered into by the bill of lading? The words of

(1) 3 Taunt, 387. (2) Moo. & M. 63.
(3) Moo. & M. 441.

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the bill of lading are "paying freight for the same goods and all other conditions as per charterparty." There is an express provision in the charterparty that the shipowner shall have an absolute lien on the cargo for all freight, dead freight, and demurrage. It is impossible not to import that into the contract entered into by the bill of lading. We are not at liberty to reject the words "all other conditions," unless there is something manifestly inconsistent in introducing them. The lien is on the cargo and on every part of it; and although the bill of lading refers to one part of the cargo, yet my opinion, as a matter of construction of the contract between the parties, is, that this condition shall be introduced, and being introduced, there is a lien on every part of the cargo for demurrage; and therefore, on the construction of the contract, the plaintiff is right. If parties choose to make these contracts they must take the consequences, and not come to the Court to enforce an unnatural construction of words simply for the purpose of avoiding an inconvenience, which possibly they may not have conceived, but which is the result of a fair construction of the contract into which they have entered. As regards the question whether the plaintiffs could recover from each holder of a bill of lading the full amount of the demurrage, the question does not arise before us, therefore I think it better not to express any opinion upon it. I think that the plaintiff has, under his contract with the defendant, a right to recover the sums sued for.

BRETT, L.J. I do not differ from the decision at which the Lord Justices have arrived, for to decide otherwise would be to break many settled rules of law. The bill of lading is, "on paying freight for the same goods, and all other conditions, as per charterparty." I endeavoured in *Gray* v. *Carr* (1) to give what I thought was a reasonable interpretation to those words, "and all other conditions as per charterparty;" but my interpretation was not accepted by the majority of the Court. I take the decision in *Gray* v. *Carr* (2) to have been that those words in a bill of lading are to be treated as words of reference to the charterparty, and that they therefore introduce into the bill

(1) Law Rep. 6 Q. B. at p. 533. (2) Law Rep. 6 Q. B. 522.

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of lading every condition that is in the charterparty by way of reference; so that they bring into the bill of lading every condition of the charterparty in its terms, and make every one of those conditions part of the bill of lading, as if they had been originally written into it. But then there is another rule which applies, which is, that if taking all the conditions to be in the bill of lading, some of them are entirely and absolutely insensible and inapplicable, they must be struck out as insensible; not because they are not introduced, but because being introduced they are impossible of application. The bill of lading must therefore be considered as if all the conditions of the charterparty had been absolutely written into it originally, and then we have a bill of lading in this form: fourteen working days for loading and unloading, and ten days on demurrage. It is impossible to say that condition is not applicable to a bill of lading, although the bill of lading represents only part of the cargo. It is applicable, although it seems to me strange that a person should enter into such a contract. Then there is another rule. The bill of lading claims to be a contract between the shipowner and the person taking the bill of lading. There is no relation whatever between the holders or takers of other bills of lading and any one holder of a bill of lading. They are not co-sureties. When, therefore, it is said we can look at all the bills of lading and then divide the days of demurrage or the lay days between them, we are looking at other bills of lading which cannot be given in evidence. They cannot be received in evidence in an action between the shipowner and the holder of a bill of lading, and therefore when it is said that the bill of lading represents a part of the cargo, and that the other bills of lading are in the same form, we break the rule which does not allow us to look at them, for we do not know whether the other bills of lading are in the same form. Then what is the contract represented by the bill of lading with the conditions in it? It seems to me that the cases of *Randall* v. *Lynch* (1) and *Leer* v. *Yates* (2), and particularly the case of *Thiis* v. *Byers* (3), shew what the contract is, when that contract is in this form. It is not that the holder of the bill of lading will discharge his cargo

(1) 2 Camp. 352. (2) 3 Taunt. 387.

(3) 1 Q. B. D. 244.

within a reasonable time after he is able to do so; it is that if the ship is not able to discharge the whole of her cargo within the given number of days after she is at the usual place of discharge, the holder of that bill of lading will pay a certain sum for each day beyond those days, however the delay may be caused, unless it is by default of the shipowner. That is stated to be so in *Thiis* v. *Byers*. (1) Therefore the holder of a particular bill of lading is bound to pay according to that contract for every day beyond the stipulated days, during which the ship remains with the cargo in her, unless the delay is caused by the fault of the shipowner.

Now in this case there is no fault on the part of the shipowner; the delay might be caused by accidents over which none of the holders of the bills of lading had any control, or it may have been caused by delay of the holders of cargo above that of the defendant. But even supposing it is by their neglect, in the contract between the shipowner and the defendant there is no stipulation about the negligence of other people. The defendant is to pay, unless it is the fault of the shipowner. The negligence of the owners of the cargo above is not the fault of the shipowner. Therefore the negligence of owners of cargo above would be one of those negligences the consequence of which the defendant has undertaken to pay for. Therefore whether they were negligent or not, it seems to me on his contract he must pay. If I could arrive at an opposite conclusion I would, for I do not share the doubt of Thesiger, L.J. I think that if the consignee of a portion of the cargo had a bill of lading in the same words, and had been called upon to pay, and had paid the whole demurrage to the shipowner, the holder of another bill of lading, if sued, could not set that up as a defence. That defence would arise in respect of a wholly independent contract between the shipowner and the holder of the other bill of lading. He could not set it up as a defence, because he would have no right to prove that other and wholly independent contract. I accept the proposition that it would be no defence for the owner of the bill of lading, to say that the shipowner had been paid the same sum by all other holders of bills of lading for cargo in the ship. Therefore I think that we are bound to follow the decision of *Leer* v. *Yates*. (2) I cannot do so without considerable

(1) 1 Q. B. D. 244. (2) 3 Taunt. 387.

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hesitation, after the expressions of opinion of eminent judges, of the authority of Lord Tenterden and Sir James Mansfield. We have to decide on a conflict of cases, and I prefer the decision of *Leer* v. *Yates* (1) to the rulings laid down in *Rogers* v. *Hunter* (2) and *Dobson* v. *Droop.* (3)

There is another solution of the problem, which has been ingeniously suggested by Mr. Maclachlan in the last edition of his book, at p. 496, where he suggests that there are two elements which enter into this question, namely, time and amount, and he proposes a solution somewhat between the opinion of Sir James Mansfield and Lord Tenterden, but his solution would break the settled rules of law, and cannot be admitted.

It has suggested itself to me that, if the holder of the bill of lading of cargo above were to delay the ship unreasonably, it is possible that the holder of the bill of lading of cargo under him might have an action against him for damages. It may be they owe the duty to each other, that no one of them shall negligently delay; but there may be difficulties in bringing an action. He may not have notice of the contract, or there may be other difficulties, still I think it is possible he may have that remedy—it is reasonable—but he certainly can have no other; he cannot maintain an action against the others for contribution; and it does not seem to me that there is any equity between them. So that I accept the whole consequence that was seen by Sir James Mansfield in *Leer* v. *Yates* (1); but at the same time I think the rules of law oblige me to say that the holder of each bill of lading is liable if the ship is delayed beyond the number of days allowed in his bill of lading. The judgment of Lush, J., is correct, and must be affirmed.

Judgment affirmed.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *Plews, Irvine, & Hodges.*

(1) 3 Taunt. 387. (2) Mood. & M. 63.
(3) Mood. & M. 441.

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Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *ss.* 3, 51—*Pecuniary Penalty—Alternative Penalty of Imprisonment—Imprisonment in Default of Payment—Order for Distress, condition of Jurisdiction under* 35 & 36 *Vict. c.* 94, *s.* 51, *sub-s.* 2.

The justices cannot order imprisonment in default of payment of a penalty under 35 & 36 Vict. c. 94, s. 51, sub-s. 2, unless there has first been an order for a distress. There is no jurisdiction to order imprisonment under that sub-section in the first instance without a distress warrant, when it appears that the defendant has no goods whereon to levy.

Per Cockburn, C.J. The 2nd sub-section of the 51st section of 35 & 36 Vict. c. 94 applies to cases where a pecuniary penalty only is attached by the Act to an offence, not to cases where a period of imprisonment other than that given by the 51st section is given as an alternative punishment.

A RULE nisi had been obtained for a habeas corpus on behalf of one Thomas Brown, who had been committed to prison by the justices of Newcastle for six calendar months, for default in payment of a penalty of 50*l.*, in which he had been convicted under 35 & 36 Vict. c. 94, s. 3, sub-s. 1.

The warrant of commitment stated that Thomas Brown had been convicted of unlawfully selling beer by retail without being duly licensed to sell the same, and adjudged to forfeit and pay the sum of 50*l.*, and to pay the costs, amounting to 7*s.*; and that it was further adjudged by the convicting magistrates that if the said several sums should not be paid forthwith, then, inasmuch as it was made to appear to the said magistrates that the defendant had no goods or chattels whereon to levy the said sums by distress, the said defendant should be imprisoned for the space of six calendar months. It then proceeded to state that the defendant had not paid the said sums, and directed his commitment according to the terms of the conviction. (1)

(1) 35 & 36 Vict. c. 94, s. 3, prohibits the sale of intoxicating liquors without a licence, and imposes the following penalties on an offender:—

(1.) "For the first offence he shall be liable to a penalty not exceeding 50*l.*, or to imprisonment with or without hard labour for a term not exceeding one month."

Sect. 51: "Except as in this Act otherwise expressly provided, every offender under this Act may be prosecuted, and every penalty and forfeiture may be recovered and enforced in

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Lawrance, Q.C., J. Edge, and *Ridley* shewed cause. The justices acted under the provisions of the 51st section of 35 & 36 Vict. c. 94. It is true that if the justices decide upon inflicting the penalty of imprisonment in the first instance, they can only inflict a penalty of a month's imprisonment: 35 & 36 Vict. c. 94, s. 3. But the imprisonment under that section is not in default of payment of the penalty. It is an alternative punishment. The 51st section deals with the mode of enforcing the penalty. There is no absurdity in providing that a larger period of imprisonment may be inflicted for non-payment of a pecuniary penalty than could have been inflicted as an alternative penalty. There may be cases in which a man has really the means of paying but may refuse to pay, and there may not be any goods that can be got at by distress.

[COCKBURN, C.J. There seems to be a great inconsistency in fixing the punishment by imprisonment in one section at a month, and then in another section giving the justices power to give six months because the offender happens to have no means of payment.]

The 51st section must be looked to for the means of recovering or enforcing the penalty, and its provisions appear to apply to all cases.

[COCKBURN, C.J. The provisions of that section only apply when the court of summary jurisdiction orders a distress. Here no distress was ordered.]

It is submitted that the section must be construed by the light of the provisions of Jervis's Act, as to enforcing penalties which are incorporated by it. By that Act (11 & 12 Vict. c. 43), s. 16, when it appears to the justices by the confession of the defendant or otherwise that he has no goods or chattels whereon a distress

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manner provided by the Summary Jurisdiction Act, 1848, subject to the following provisions.

"(2) Where the Court of Summary Jurisdiction orders that a distress shall be made in default of payment of any penal sum exceeding five pounds, including under that expression costs actually adjudged in respect of any offence, the Court may order that, in default of the said sum being paid as directed, the person liable to pay the same shall be imprisoned for any time not exceeding the period specified in the following scale . . . . for any sum exceeding thirty pounds, but not exceeding fifty pounds, six months."

may be levied, the justices may commit him for such time and in such manner as by law he might have been committed if a warrant of distress had issued and no goods or chattels could be found whereon to levy the penalty.

It cannot have been intended that the idle ceremony of issuing a distress warrant should be gone through where the defendant has no goods.

Lockwood, in support of the rule, was not called upon.

COCKBURN, C.J. I am of opinion that this rule should be made absolute on two grounds: first, I think, on the more limited ground that the conditions, upon which the 2nd sub-section of the 51st section of 35 & 36 Vict. c. 94 is brought into operation, are wanting. The words of the 2nd sub-section of the section are, "Where the court of summary jurisdiction orders that a distress shall be made in default of payment of any penal sum exceeding 5*l.*, &c., the Court may order that in default of the said sum being paid as directed, the person liable to pay the same shall be imprisoned for any term not exceeding the period specified in the following scale." The condition upon which the whole sub-section depends is, that the Court shall have ordered a distress. I feel the force of the contention that it is idle to issue a distress warrant against a man who has nothing to distrain upon. But the words are express and positive. It is suggested that the provision of Jervis's Act applies by which the issuing of the distress warrant is made unnecessary, when the justices are satisfied that the defendant has no goods to distrain upon. There are no words, however, in this section which in any way permit of the provision being made available. But, secondly, I should desire to go further and put my judgment on the broader ground that the 51st section, sub-s. 2, does not apply to this case. We must read the Act as a whole, and by the 3rd section for the first offence the offender is to be liable to a penalty not exceeding 50*l.*, or to imprisonment with or without hard labour, for a term not exceeding one month. It seems to me that it would be irreconcilably inconsistent to enact in one section that the penalty should be a sum not exceeding 50*l.* or imprisonment for a month, and in another, that because the defendant has not the means of paying the penalty, and no goods to

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distrain upon, the imprisonment, which if awarded in the first instance would have been a month, should become six months. I think this would be an absurdity. I am the more inclined to take the view I am expressing, because I find plenty of matter to which the 51st section can be applied without giving rise to this absurdity. There are a number of offences mentioned in the Act for which a penalty is prescribed, without the alternative of imprisonment as a punishment. I think the 51st section may be applied to these, but I do not think it can be applicable when an alternative punishment by way of imprisonment is given. The rule must, therefore, be made absolute.

MELLOR, J. I do not dissent from the judgment of my Lord, that this rule must be made absolute. I do not, however, entertain a very confident opinion on the subject. I do not agree with my Lord in thinking that the 1st sub-section of section 3 gives the measure of imprisonment to which the defendant is to be subjected if he cannot pay the fine.

If that had been the meaning, the legislature might have said "in default of payment, imprisonment for a term not exceeding one month." But that is not the language they have used. By the 3rd section the imprisonment is only mentioned as an alternative punishment. The section has nothing to do with the recovery of the penalty. Now the 51st section, which is the section under which the justices professed to act, provides that the penalty may be recovered in the manner provided by Jervis's Act, and we must therefore look to that Act for the mode of enforcing the penalty. But by the 51st section the incorporation of Jervis's Act is subject to the subsequent provisions of the section. The 2nd sub-section of the section gives the period of imprisonment to be imposed for non-payment of the penalty, but the words at the commencement of that sub-section are "where the court of summary jurisdiction orders a distress." That would seem to be a condition of the exercise of the powers of the section. I consider it very doubtful whether the liability to imprisonment can arise under this section unless there has been an order for a distress. Where a question of imprisonment is involved we must be satisfied that the man is lawfully imprisoned. I cannot say I

am so satisfied here, and under those circumstances, I am not prepared to dissent from the conclusion at which my Lord has arrived, viz., that the rule should be made absolute.

Rule absolute.

Solicitors for justices: *Collyer-Bristowe & Co., for Hill Motum, Newcastle-upon-Tyne.*

Solicitor for applicant: *Wheeler, for Bush, Newcastle-upon-Tyne.*

HARRINGTON *v.* THE VICTORIA GRAVING DOCK COMPANY. *June* 4.

Contract—Corrupt Consideration—Money promised to Agent or Employé to bias him contrary to his Principal's Interests.

The defendants contracted to pay the plaintiff a commission for superintending repairs to be executed by them on certain ships belonging to the Great Eastern Railway Company. The plaintiff at the time of such contract being made was in a position of trust in relation to the railway company, having been employed by them as an engineer to advise them as to the repairs, and the contract between defendants and plaintiff was made in part in consideration of a promise that the plaintiff would use his influence with the railway company to induce them to accept the defendants' tender for the repair of the ships. The jury found that the contract, though calculated to bias the mind of the plaintiff, had not, in fact, done so, and that he had not in consequence thereof given less beneficial advice to the company as to the defendants' tender than he would otherwise have done:—

Held, that the plaintiff could not maintain an action for commission under the contract, on the ground that, even although the plaintiff had not been induced to act corruptly, the consideration for the contract was corrupt.

THE action was brought for the balance of moneys alleged to be payable by the defendants to the plaintiff under an agreement, by which the defendants undertook to pay the plaintiff a commission of 5 per cent. for superintending repairs to two ships executed by the defendants for the Great Eastern Railway Company. The defence was in substance as follows:

The plaintiff had been employed by the Great Eastern Railway Company as an engineer to advise them with relation to the repairs that were necessary to the ships, and to make estimates as to the cost of such repairs. It was alleged by the defendants that the commission so agreed to be paid by the defendants to the plaintiff was agreed to be paid, upon an understanding that the plaintiff should use his influence with the Great Eastern Railway

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Company to obtain the acceptance by the company of the defendants' tender for the repairs, and that the agreement was therefore void as being made on a corrupt consideration. (1)

The jury found, in answer to questions put to them by Field, J., before whom the trial took place, that the agreement to pay the 5 per cent. was in consideration in part of the plaintiff's undertaking to superintend, on behalf of the defendants, the execution of the works contracted for; that the agreement to pay the 5 per cent. was in consideration in part of a promise by the plaintiff to use his influence with the Great Eastern Railway Company to obtain an acceptance of the defendants' tender; that the plaintiff, at the time the arrangement was made, was in a position of trust and confidence in relation to the Great Eastern Railway Company in reference to the tender for the repairs of the ships, and that the agreement was calculated to bias the mind of the plaintiff so that he should not give his full, free, and unfettered advice to the Great Eastern Railway Company. But they found that the agreement did not so bias the mind of the plaintiff, and that he did not give advice to the company less beneficial than he otherwise would in reference to the said tender. They also found that the arrangement was not disclosed to the company.

The learned judge did not enter judgment on these findings at the trial for either party.

A. L. Smith, for the plaintiff, moved for judgment. It must be admitted that when the consideration is partly good and partly corrupt no action will lie. But it is contended that the effect of all the findings taken together is that here no part of the consideration was corrupt. The defendants undertake to pay the plaintiff this sum for labour actually to be done for them. No doubt their object in employing him was to bias his mind, and induce him to favour them in advising his employers as to the tenders. But then it is found that this latter object failed, and the employers were not damaged, for he gave them the benefit of his full, free, and unfettered judgment. It does not under these

(1) The agreement to pay the commission to the plaintiff was made by an official of the defendants' company without the knowledge of the directors of the company, and the directors, when they knew of the agreement, repudiated it.

circumstances lie in the defendants' mouths to say that part of the consideration was corrupt. The Great Eastern Company could not maintain any action against the plaintiff for breach of duty in his employment by them.

Parry, Serjt., and *Jeune*, for the defendants, were not called on to shew cause.

[In the course of the arguments the case of *Smith* v. *Sorby* which is reported in a note at the end of this case, was referred to.]

COCKBURN, C.J. Our judgment must, in my opinion, be for the defendants. I will assume, for the purposes of argument, that the agreement did not influence the mind of the plaintiff so as to induce him to do anything dishonest towards his employers, the Great Eastern Railway Company. I entertain no doubt, however, that when a bribe is given, or a promise of a bribe is made, to a person in the employ of another by some one who has contracted, or is about to contract, with the employer, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one, and is not enforcible at law, whatever the actual effect produced on the mind of the person bribed may be. The tendency of such an agreement as this must be to bias the mind of the agent or other person employed, and to lead him to act disloyally to his principal. It is intended by the party who promises the bribe to have that effect, and the other party knows such is his intention. Such a bargain is obviously corrupt. It would plainly be in contravention of the maxim, e turpi causâ non critur actio, and most mischievous to hold that a man could come into a court of law to enforce such a bargain on the ground that he was not in fact corrupted. It is quite immaterial that the employer was not in fact damaged. It is sufficient that the consideration upon which the promise was made was intended to be a corrupt one.

MELLOR, J. I am of the same opinion. It is not because the agreement failed to have the effect which it was intended to have in corrupting the plaintiff's mind that therefore it can afford the basis of a good cause of action. It would be most fatal if it were open to a person, who had entered into an agreement that he knew

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was designed to induce him to act unfaithfully to his employers, to allege that it had not in fact had that effect, and to recover upon it on the ground that the employer had not been damaged.

FIELD, J. I am of the same opinion. I am very glad that we have an opportunity of distinctly declaring the law upon this point, which was left undecided in the case of *Smith* v. *Sorby*. The present case affords an instance how sadly loose commercial practice has become in respect to transactions of this nature. If the point we are now deciding has never been exactly decided before, it is most clearly within the principles laid down by the authorities on the subject. It really needs no authority to shew that, even although the employers are not actually injured, and the bribe fails to have the intended effect, a contract such as this is a corrupt one, and cannot be enforced.

Judgment for the defendants. (1)

Solicitors for plaintiff: *Cattarns, Jehu, & Hughes.*
Solicitors for defendants: *Gedge, Kirby, & Millett.*

(1) Jan. 30, 1875. Q. B. D.

SMITH *v.* SORBY.

Contract—Fraud—Principal and Agent—Secret Gratuity to Agent—Avoidance of Contract.

Where a secret gratuity is given to an agent with the intention of influencing his mind in favour of the giver of the gratuity, and the agent, on subsequently entering into a contract with such giver on behalf of his principal, is actually influenced by the gratuity in assenting to stipulations prejudicial to the interests of his principal, although the gratuity was not given directly with relation to such particular contract, the transaction is fraudulent as against the principal, and the contract is voidable at his option.

THIS was an action for breach of an agreement by the defendant to supply the plaintiff with coals, in answer to which the defendant pleaded that the agreement was voidable by reason of fraud and collusion between the plaintiff and the defendant's agent, who entered into it under the following circumstances:—In October, 1869, the agent who managed the defendant's colliery, with the defendant's knowledge, entered into an agreement with the plaintiff that the plaintiff should supply fifty waggons for use in connection with the defendant's colliery for the period of five years, and that the hire of the waggons should be paid either in money or in coals at the then market rate, which was 6*s.* a ton, at the defendant's option. The plaintiff, immediately after the making of this agreement, promised the agent to pay him 1*l.* for every waggon by way of commission, and

10*l.* as a bonus. This he did, according to his own account, in hopes of further business.

In December, before the time for the performance of the contract had arrived, the agent agreed with the plaintiff for an alteration of the terms, and an arrangement was made, as the defendant stated without her knowledge or authority, by which the contract for the supply of waggons was to be transferred to a company with whom the defendant was to enter into a contract for that purpose, and the agent on the defendant's behalf was to enter into a distinct and independent contract to supply the plaintiff yearly on demand during five years, with coal amounting in the aggregate to 12,000 tons, at the rate of 6*s.* 6*d.* a ton.

The defendant signed the contract as to the waggons, supposing, as she stated, that it was the only contract, and that it simply gave effect to the first mentioned agreement, to which she had already assented, and the agent signed the second contract for the supply of coals. The agent admitted that the defendant did not know of the promise of payment to himself, but asserted that she knew of the second contract. The defendant, however, swore that she never knew of the second contract till long afterwards, and it appeared that no demand for the coal or deliveries had taken place in 1870, 1871, and 1872. In 1873 the price of coals had risen to 1*l.* a ton, and the plaintiff demanded delivery of the coals under the alleged contract at 6*s.* 6*d.* a ton.

The defendant's case was, that the secret agreement for payment of a commission to the agent was intended to influence his mind in favour of the plaintiff to the prejudice of his employer, and that it did, in fact, influence his mind in entering into the agreement of December.

Pollock, B., before whom the trial took place, directed the jury that the giving of a commission to an agent, though improper, was not necessarily fraudulent, and that, in order to vitiate the contract on the ground of fraud, there must have been an intention on the part of the party offering the commission to induce the agent in entering into the contract to betray his principal's interests, and the mind of the agent must, in fact, have been corruptly affected by such inducement. The jury found for the plaintiff, stating that though the practice of giving commissions to servants or agents was objectionable in their opinion, yet there had been nothing amounting to fraud in the case before them.

A rule nisi had been obtained for a new trial on the ground of misdirection, and on the ground that the verdict was against evidence.

Field, Q.C., *Wills*, Q.C., and *Chandos Leigh* shewed cause.
Digby Seymour, Q.C., and *Gould* supported the rule.

COCKBURN, C.J. We are of opinion that the rule must be made absolute for a new trial. It is unnecessary to decide whether the secret payment of a gratuity to an agent by the party with whom he is authorized to negotiate on behalf of his employer, supposing that it had no effect at all on the mind of the agent so as to induce him to make an agreement less beneficial to his employer than he might otherwise have the opportunity of making, will vitiate the contract made by an agent under such circumstances. It is enough for the decision of the present case to say that, in my opinion, if a party with whom an agent is negotiating on the part of another agrees to give, or does give the agent a secret

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gratuity, and that gratuity does influence the mind of the agent, directly or indirectly, in assenting to anything prejudicial to his employer in making the contract, the contract is vitiated. Now, on looking at the facts of this case, I cannot help thinking that, quite unintentionally on the part of the learned judge, the jury have not been led to take the view of the question which they ought to have taken. The first agreement in October was a beneficial one for the defendant. It gave an option to pay for the waggons in money or in coals which, as it turned out, would have been of advantage to her. In December the agent who had previously received the gratuity agreed to an alteration of the terms. And under the fresh arrangement the defendant was to have no option to deliver coals or pay money, but became bound to deliver the coals at a fixed price. The result was very disadvantageous to the defendant. If in assenting to this fresh arrangement the agent was influenced by the gratuity that he received, then I think the principle I have laid down would apply, and the contract would be vitiated. We all agree that the giving of such gratuities is highly improper and morally objectionable, because they are necessarily calculated to sap the fidelity of the agent towards his employer. Such being the case, if we can see our way to the conclusion that the gratuity in this case did actually affect the mind of the agent, then, in my opinion, a sufficient case of fraud has been made out to vitiate the contract.

Now it seems to us, on the whole, that the jury may not have had their minds sufficiently directed to the true issue in this case. The direction of the learned judge may have left it open to them to think that because the gratuity was actually given in reference to the first contract, and had no direct connection with the second, they ought not to consider the substitution of the second contract as having possibly been influenced by the gratuity. But if the operation of the gratuity was to influence the mind of the agent in a manner favourable to the party offering it, it obviously might operate on his mind adversely to his principal in relation to the second contract.

We find that the stipulations of the second contract were much more unfavourable to the defendant.

When the agent came to make a second contract, would not his mind be likely to be influenced in assenting to such stipulations by the fact that he had received a very large gratuity in connection with the first contract? It seems to me that a very fair and reasonable presumption arises that it would be so. And this, as it seems to me, ought to have been distinctly put to the jury. They should have been told that if the gratuity was given to the agent in order that he might have a favourable disposition towards the party giving it, and it had that effect, and he was thereby induced to enter into the second contract, that was quite enough to vitiate the second contract. The learned judge may have intended to leave the case to the jury in that way, but his language is somewhat ambiguous, and the finding of the jury leads one to think that at any rate they could not have sufficiently taken into account the considerations I have just mentioned. On the whole, I think there should be a new trial. The verdict is not, to my mind, satisfactory, and I think a second jury should have an opportunity of considering the case.

BLACKBURN, J. I am of the same opinion. There can be no doubt that the giving of a secret gift or gratuity to an agent is very improper. The learned

judge appears to have told the jury that it was fraudulent if it was done with the intention of influencing the mind of the agent to betray his principal, which he otherwise would not do, and if it in fact produced that effect, but that otherwise it was not fraudulent. I am not prepared to say that there is an absolute presumption, præsumptio juris et de jure, that the giving of such a gratuity amounts to fraud. I think it is a question for the jury, and if they think that the gratuity was given without the knowledge of the principal, and with the intention of influencing or biassing the mind of the agent in favour of the person giving it, and that it did produce the effect of biassing the mind of the agent in favour of such person, and so acted as an inducement to him in entering into a contract or carrying one out, then I think the jury ought to find that there is what amounts to fraud. I cannot help thinking that no jury could have come to any other conclusion than that this money was given to the agent to bias his mind in favour of the plaintiff, and that his mind was so biassed, if the considerations I have adverted to had been fully before them. I am not satisfied that in this case they were put before the jury by the learned judge with sufficient distinctness. Looking at all the circumstances, I think the case should go down again for a new trial.

MELLOR, J., concurred.

Rule absolute.

EMMOTT *v.* MARCHANT.
HALKETT, CLAIMANT.

May 4.

Bill of Sale—17 & 18 *Vict. c.* 36, *s.* 1—*Proof of filing Bill of Sale and Affidavit—Certificate of Registration—Non-production of Documents filed—Evidence.*

A certificate under the seal of the Queen's Bench Division, that an affidavit and copy bill of sale were filed as required by 17 & 18 Vict. c. 36, s. 1, does not relieve the party relying upon such bill of sale from the necessity of producing the copy filed, so as to shew that it is in the same terms as that proved to have been executed:

Semble, per Lush, J., that such certificate of the filing of an affidavit under 17 & 18 Vict. c. 36, is, without production of the affidavit itself, primâ facie evidence that the affidavit was in the form required by the Act.

RULE calling on the plaintiff (execution creditor) to shew cause why the verdict and judgment given in this action in the Clerkenwell County Court, barring the claim of the claimant, should not be set aside and entered in favour of the claimant.

It appeared from the county court judge's notes that upon the hearing of an interpleader summons the claim was founded on a bill of sale, whereby the execution debtor on the 24th of May, 1876, conveyed the goods seized to the claimant. On behalf of the claimant proof was given of the execution of the bill of sale,

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and a certificate under the seal of the Court was produced that an affidavit and copy bill of sale, indorsed with the names of the grantor and the claimant, were on the 26th of May, 1876, registered at the judgment office of the Queen's Bench Division.

The judge held that the claimant was bound to produce in addition to the above evidence authenticated or office copies of the affidavit, and copy bill of sale certified to have been filed, and barred the claim, refusing to allow the claimant an adjournment for the production of the necessary documents.

Bigham, shewed cause. The county court judge was right in holding that the registration of the bill of sale was not proved. The certificate only shewed that an affidavit of some kind and a document purporting to be a copy bill of sale were filed. *Mason* v. *Wood* (1) is in point. There a similar certificate was held to be no evidence that an affidavit satisfying all the requirements of the statute had been filed with the bill of sale. The same objection applies to the claimant's evidence of the filing of the bill of sale.

Jelf, in support of the rule. There was sufficient primâ facie evidence that the bill of sale filed was the same as that proved. *Mason* v. *Wood* (1) is really in favour of the claimant. The decision proceeded upon the absence of certain words in the certificate, which in the present case were introduced in it. As for the objection that the bill of sale was not shewn to be a true copy of that proved, *Gugen* v. *Sampson* (2) shews that it is not an objection that ought to be entertained on the trial of an interpleader issue.

[MELLOR, J. Of late years there has been no difference between the evidence received upon the trial of an interpleader issue, and in other cases.

LUSH, J. *Gugen* v. *Sampson* (2) seems in this respect to be in conflict with *Grindell* v. *Brendon*. (3)]

Waddington v. *Roberts* (4) where a memorandum written on the face of a composition deed registered under the Bankruptcy Act, 1861, was held to be primâ facie evidence that an affidavit

(1) 1 C. P. D. 63.
(2) 4 F. & F. 974.
(3) 6 C. B. (N.S.) 698; 28 L. J. (C.P.) 333.
(4) Law Rep. 3 Q. B. 579.

pursuant to the statute had been delivered to the registrar, is, though upon the construction of a different Act, an authority in favour of the claimant.

MELLOR, J. We are satisfied that upon the main question submitted to him the county court judge was right. I feel bound to say that objections to the sufficiency of the description under the Act of the grantor's residence and occupation have been carried rather too far. The object of the Bills of Sale Act, 1854, is a very good one; it is to prevent creditors from being defrauded by secret bills of sale, but I think the conditions imposed by the Act have been made to extend at least as far as they ought. I think, however, the county court judge was quite right in holding that the document produced to him was not sufficient evidence. I quite yield to the principle referred to by Mr. Jelf that credence ought to, primâ facie, be given to every official statement in writing by a public officer, and that it must be disproved if possible by the party seeking to impeach the bill of sale. Here, however, it was necessary for the claimant to prove compliance with the conditions of the Act, and in this he failed. The rule must therefore be discharged. I am bound to add that an adjournment ought in my opinion to have been granted.

LUSH, J. I am sorry to say that I am of the same opinion. The case is a hard one, but I do not see how we can interfere, though I am certain that if the action had been tried before me I should have granted the application for an adjournment. The chief question is—was the certificate primâ facie evidence of the bill of sale? There can be no doubt that there is a presumption that a public officer has duly discharged his duty, and the certificate is evidence that a document purporting to be a bill of sale was delivered to the officer, together with an affidavit which was correct in point of form—that is stating the residence and occupation of the grantor as prescribed by the Act. I say nothing about the case of *Mason* v. *Wood* (1); there the certificate was differently worded. I will assume that the affidavit was good in point of form. The objection remains that the bill of sale filed was not shewn to be a true copy of that proved at the trial.

(1) 1 C. P. D. 63.

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I am inclined to think that where a certificate like the present one is put in it is not necessary for the claimant to produce a copy of the affidavit, but that it must be left to the plaintiff to produce the affidavit, and to shew that it is defective. This, however, does not relieve the claimant from the burden of shewing that the bill of sale proved is the same as that which was registered. The rule must therefore be discharged.

Rule discharged.

Solicitors for plaintiff: *Chester, Urquhart, Mayhew, & Holden, for Boddington & Ball, Manchester.*

Solicitors for claimant: *Richard Jones & Co.*

May 18.

[IN THE COURT OF APPEAL.]

LOHRE *v.* AITCHISON.

Marine Insurance—Partial Loss—Cost of Repairs—Allowance of one-third New for Old—Suing and Labouring Clause—Salvage Expenses.

The defendant insured the plaintiff for 1200*l.* upon a ship valued at 2600*l.*; the policy contained a suing and labouring clause. The ship, encountering rough weather, suffered sea damage, and incurred salvage expenses to the amount of 519*l.* She was repaired, and the result of the repairs, the ship being an old one, was to make her more valuable when repaired than she was at the time of the insurance:—

Held, affirming the judgment of the Queen's Bench Division, that the cost of repair with a reduction of one-third new for old was the measure of the loss, if the shipowner elected to repair, and consequently that the assured was entitled to recover it up to the amount insured for, even although the amount thus estimated might be more than the amount payable on a total loss with benefit of salvage.

Held, also, reversing the judgment of the Queen's Bench Division, that the plaintiff was entitled to recover a proportion of the salvage expenses in addition to the amount for which the policy was underwritten.

APPEAL of the defendant from the judgment of Mellor and Lush, JJ., and cross appeal of the plaintiff from the same. The facts of the case are fully stated in the report of the proceedings before the Queen's Bench Division (1), and also in the judgment of this Court.

(1) 2 Q. B. D. 501.

Jan. 14, 15, 16. *Benjamin, Q.C.*, and *J. C. Mathew*, for the defendant. First, the damage sustained by the plaintiff's ship was so great as to constitute an actual total loss within the meaning of the policy sued on; whenever an actual total loss occurs, the underwriter is entitled to the benefit of everything accruing to the owner in the nature of salvage: *North of England Insurance Association* v. *Armstrong* (1); but the plaintiff claims to retain the ship and to obtain from the defendant the total amount insured: this is manifestly unjust to the underwriter, and the present action is an attempt to keep the salvage by treating a total loss as a partial loss; as the ship remains in the plaintiff's hands, he cannot recover the full amount of the defendant's subscription. A policy of marine insurance is merely a contract of indemnity: if the plaintiff is allowed to succeed in this action, he will recover more than he has lost. Secondly, if it is held that there has been no actual total loss because the ship after receiving the damage was still afloat, there was at least a constructive total loss, for the cost of repairing her was so great that no prudent uninsured owner would have incurred it; and as the plaintiff has not abandoned the ship to the underwriters, he cannot recover as for a constructive total loss. Thirdly, even if the loss is to be treated as partial only, the plaintiff cannot recover the whole amount insured, for he would thereby receive 100 per cent. The cost of repairing a ship damaged by the perils of the seas is at most only evidence of the shipowner's loss; it may be sometimes a measure of it, but it is not a decisive test of it. In the present case the loss of the plaintiff is to be measured by ascertaining the depreciation in the value of the ship as a saleable chattel, after she had sustained the injury in question. Fourthly, the Queen's Bench Division was right in holding that the plaintiff could not recover under the suing and labouring clause the amount of the salvage expenses. It may be admitted for the defendant that upon separate policies the assured may in respect of different injuries recover more than the value of the ship insured: *Lidgett* v. *Secretan* (2); and it may be further admitted, that even under the same policy if a vessel be damaged and afterwards repaired, and if at a subsequent time she be totally lost, the underwriter may be liable for more than

(1) Law Rep. 5 Q. B. 244. (2) Law Rep. 6 C. P. 616.

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the amount of his subscription; but in that case the occasions of sustaining damage are different: here the plaintiff claims to recover more than the defendant's subscription in respect of the same loss.

Cohen, Q.C., and *F. W. Hollams*, for the plaintiff. It is submitted that there was no actual total loss, because the plaintiff's ship after receiving damage was still afloat, and that there was no constructive total loss, because her condition was such that a prudent uninsured owner would have repaired her: *Irving* v. *Manning*. (1) The loss was partial, and the plaintiff was entitled to repair the ship: the assured is never bound to abandon his vessel, and the only real question is whether the repairs actually executed were reasonable: *Stewart* v. *Steele* (2); upon the findings in the special case it is clear that they were necessary to make the ship seaworthy. The salvage expenses were incurred in order to avoid a loss for which the defendant as underwriter would have been liable; and therefore they are recoverable under the suing and labouring clause in the policy of insurance: that clause gives a distinct and independent remedy to the assured, and he may under it recover expenses incurred on behalf of the adventure, and may at the same time recover the whole amount subscribed: *Kidston* v. *Empire Marine Insurance Co.* (3)

Benjamin, Q.C., replied.

Cur. adv. vult.

May 18. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was delivered by

BRETT, L.J. This was a special case. The material facts were that the action was brought by the plaintiff, the owner of the ship *Crimea*, on a voyage policy effected with the defendants for 1200*l.*, on ship valued at 2600*l.*, the policy being in ordinary form, containing a suing and labouring clause. The ship, during the voyage insured, encountered severe weather. According to one of the paragraphs of the case: "On the 30th of January, the ship then being in great danger of being completely lost, and in a helpless condition, and not capable of being navigated, those on

(1) 1 H. L. C. 287.
(2) 5 Scott, N. R. 517.
(3) Law Rep. 1 C. P. 535; in Ex. Ch. 2 C. P. 357.

board of her sighted the steamship *Texas*, which ultimately took her in tow, without any agreement being come to as to remuneration for the service, and took her into Queenstown." For these services the ship, freight, and cargo were sued in the Admiralty Court, where salvage was awarded. The ship's proportion of salvage and general average charges was 515*l.* The ship was surveyed, estimates were made, a contract was entered into, the ship was repaired, and she was metalled, which she had not been before. The amount expended on the ship, exclusive of metalling, was 4414*l.*: deducting one-third new for old in all matters to which such deduction is properly applicable, this was reduced to 3178*l.* The case then contained the following paragraph, from the full force of which we have no power to derogate; we are bound to accept it in its ordinary sense in full as correct; it is as follows: "All the works, except the metalling, &c., were undertaken for the purpose of making the ship staunch, and strong, and seaworthy, which she had ceased to be by reason of the sea damage she had sustained, *and they were reasonably necessary for that purpose;* the effect of these works was to make the ship a very much stronger and better ship, and of very much greater value than she had been before she sustained damage." The value of the ship after repairs was 7000*l.* The case then stated the contentions of the parties; but it is unnecessary further to refer to them, as they were not pressed in argument as correct. Before us, the substantial contention on behalf of the plaintiff was that he was entitled to be paid in respect of the loss arising from the expenses of repairs 1200*l.*, the full sum insured, and besides and beyond that sum a proportion of the salvage and general average charges of 515*l.*, to be recovered by virtue of the suing and labouring clause. It was contended on behalf of the defendant on several grounds that he was only liable to pay in respect of the loss a proportionate part of 1200*l.*, and that he was not liable to pay any part of the 515*l.* under the suing and labouring clause.

The dispute thus raised is one with regard to the mode of ascertaining the amount of a loss under a policy in ordinary form, and of adjusting that amount when ascertained. Such disputes have for a long period been determined according to recognised rules. As many of the arguments presented to us seemed to trench

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violently on several of those rules, it appears to us advisable to state our view of the binding force of those rules, and the reasons why they have a binding and exclusive force. They are rules which originated either in decisions of the Courts upon the construction or on the mode of applying the policy, or in customs proved before the Courts so clearly or so often as to have been long recognised by the Courts without further proof. Since those decisions and the recognition of those customs, merchants and underwriters have for many years continued to enter into policies in the same form. According to ordinary principle, then, the later policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by those decisions and customs are part of the contract. And though a Court now might differ from the correctness of the rules as originally laid down, it must yet now act upon those rules as parts of the contract or as agreed modes of carrying it out.

It was urged on behalf of the defendants, that there was in this case an actual total loss with benefit of salvage. The rules for determining whether or not there has been an actual total loss within the meaning of an ordinary policy are well established, and are of the nature of those above described. All the novel rules therefore proposed by Mr. Benjamin, are inadmissible. According to the recognised rules, there cannot be a total loss of ship where she is safe in the hands of the owners, still bearing the character of a ship, however greatly damaged. There is an actual total loss, if by perils insured against, the ship has wholly disappeared, or is so damaged as to have lost the character of a ship, or, though still a ship, has, by capture, or a justifiable sale or otherwise, become wholly lost to her owners. But in the present case, the ship was saved and restored to her owners as a ship, though greatly damaged; salvage indeed has been awarded to salvors for saving her as a ship; and there has been no sale. Moreover, if there had been a sale, it could not have been justified, or this loss made by it a total loss; because the rule as to that is, that a sale by the master cannot be justified as against his owners, or as against underwriters, nor a sale even by the owners, constitute a total loss as against underwriters, if the ship being disabled can be repaired so as to be a seagoing ship at an expense less than her value when

repaired. The contrary is found in this case. It was further argued that the ship was, if not an actual, at least a constructive total loss. The rule for determining this question is also a settled rule. It would, in the circumstances of this case, be the same as that just enunciated with regard to a justifiable sale. In this case, therefore, no abandonment could have been supported, even if notice of abandonment had been given. But no such notice was given, and it is impossible to maintain that there was a constructive total loss. There was, therefore, no total, but only an average or partial loss in this case. And that being so, there can be no benefit of salvage; upon a partial loss no such claim arises.

The questions, therefore, on the first part of this case, are reduced to these: what is the proper mode of ascertaining the amount of a partial loss arising in respect of the expense of repairing a damaged wooden ship; and what is the proper mode of adjusting such a loss under a valued policy?

Now, as to the first, there is an established mode of estimating the amount; the ship must be repaired, or estimates may be procured for repairing her, so as to make her as nearly as possible equal to what she was before the damage caused to her by the perils insured against, and in either case at such reasonable cost as the shipowner can by reasonable effort procure. "The underwriter is responsible for the repair or restoration of the damaged or destroyed part of the ship or article belonging to it with materials, workmanship, style, and finish corresponding to its original character." Phillips, s. 1428. It has been found by experience that no carpentering can be so skilful as to replace exactly the damage which has occurred; if a ship be from age or construction a weak ship, it may, although she was seaworthy at the commencement of the risk, be impossible so to repair her as to make her equal to what she was before, or even a sea-borne ship, without either by the superior strength of materials used in the same manner as the old materials, or by a necessary change of plan of construction, making her a stronger, and therefore a more valuable ship than she was before. It has further been found by experience, that it is almost impossible to ascertain with any exactness the difference between the value of the ship before the damage and the value added to her by repairs. "A general usage,

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which the law follows as founded in public convenience, has therefore applied a certain rule in all cases." Phillips on Insurance, s. 1431. This rule is also one of those before described, and therefore is the only rule. The rule is that "where timbers or other materials are replaced by new" (or are treated upon estimate as so replaced), "the vessel when repaired" (or when treated as repaired) "is considered to be better than before, and accordingly the assured must himself bear one-third part of the expense of the labour and materials for the repairs, and this deduction is said to be on account of new for old." Phillips, s. 1431. "Where the damage has been repaired, the established mode of estimating its amount is, in case of wooden ships to deduct one-third from the whole expense both of labour and materials which the repairs have cost, and to assess the damage at the remaining two-thirds." This is termed deducting one-third new for old. "To avoid discussion in each particular case, the amount of deduction is fixed at one-third." Arnold on Insurance, 5th ed. p. 901. The amount, therefore, of the partial loss arising in respect of the expense of repairing a damaged wooden ship, is the reasonable cost of so repairing her as to make her as nearly as possible equal to what she was before the damage caused to her by the perils insured against, less one-third new for old; that is to say, less one-third of the expense of the labour and materials used in making the repairs; and this mode is equally applicable, whether the ship is, by the repairs which are necessary to make her equal to what she was before the damage, made only a little or very largely of greater value than she was before the damage. The amount of the partial loss caused by repairs in this case was therefore 4414*l.*, less one-third new for old; or as found in the case, 3178*l.*

The next question is, how is this amount or loss to be adjusted. Here again it must be repeated that there is a recognised, long-adopted rule, and that it is, therefore, the only one. The relation between the amount of so much of the ascertained loss caused by expenses of repairing as is to be borne by the underwriters and the value of the ship at the commencement of the risk must first be established. In a valued policy that value of the ship is the valuation in the policy and no other: in an open policy that value must be ascertained by evidence. Then in order to adjust the

loss, the underwriters as a whole are, and each underwriter is, to pay an amount bearing the same relation to the sum insured by them or him as the amount of the ascertained loss bears to the value of the ship at the commencement of the risk. When the amount of the ascertained loss by repairs is less than the value of the ship at the commencement of the risk, or which is equivalent, to the value of the ship stated in the policy, the relation is expressed in business by a percentage expression, as that the loss is 20 per cent., or 50 per cent., or 90 per cent. Then the underwriter is said to be liable to pay the same percentage of the sum insured. According to the rule, therefore, if the percentage of the loss is 99 per cent. to the original value of the ship, the underwriter must pay 99 per cent. of the sum insured. This, by the argument adduced to us, was admitted; but it was urged that the rule cannot be applied, because it is wholly unjust to apply it, if the relation of the amount of loss to the original value of the ship is 100 per cent. or greater than 100 per cent.; and in order to replace the rejected rule, many new ones were suggested. But if the rule were the only rule, the only logical conclusion would be that if the first relation is 100 per cent. or more than 100 per cent., so must the second relation be, and the underwriter must pay accordingly 100 per cent. or more than 100 per cent. of the sum insured. There is, however, another and, to a certain extent, a controlling rule: "The liability of insurers on a single loss is, without question, limited to the amount insured (and the expense of suing, &c.), and the payment of the whole amount for a single loss discharges them from further liability:" Phillips on Insurance, s. 1743. Where the relation of the ascertained loss to the value of the ship at the commencement of the risk or to the value stated in the policy is greater than 100 per cent., the underwriter, who by the rule for adjustment would have to pay more than 100 per cent., is by the rule of limitation of liability absolved from paying more than 100 per cent., but there is nothing to prevent his liability to the extent of 100 per cent. The defendant, therefore, here was bound to pay in respect of the loss arising from the ascertained expense of repairs 1200*l.*, the whole sum insured; although the loss was according to the phraseology of insurance law only a partial as distinguished from a total loss under the policy.

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4 C P D 376

4 Asp Cas 765

The next question is whether the defendant is not bound also to pay a further and additional sum in respect of an alleged obligation to do so, by reason of the suing and labouring clause. That depends, considering the subject generally, upon the construction of the suing and labouring clause, and on the application of the clause to a particular case, upon whether the occasion upon which the alleged expenses were incurred was such as is within the clause, and whether the expenses were of such a character as are within the clause. Now the general construction of the clause has been held to be, and we think is, that if by perils insured against the subject-matter of insurance is brought into such danger that without unusual or extraordinary labour or expense a loss will very probably fall on the underwriters, and if the assured or his agents or servants exert unusual or extraordinary labour, or if the assured is made liable to unusual or extraordinary expense in or for efforts to avert a loss, which, if it occurs, will fall on the underwriters, then each underwriter will, whether in the result there is a total or a partial loss, or no loss at all, not as part of the sum insured, but as a contribution independent of and even in addition to the whole sum insured, pay a sum bearing the same proportion to the cost or expense incurred as the sum they would have had to pay if the probable loss had occurred, or to the loss, which because the efforts have failed has occurred, as that loss bears to the sum insured. "There is a question," says Willes, J., in *Kidston* v. *Empire Marine Insurance Association* (1), "whether the clause ought to be limited in construction to a case where the assured abandons, or may perchance abandon, so that the expense incurred is not only in respect of a subject-matter in which the underwriters are interested, but upon property which by the abandonment actually becomes or may become theirs, or whether it extends to every case in which the subject of insurance is exposed to loss or damage for the consequences of which the underwriter would be liable, and in warding off which labour is expended. The question manifestly depends upon the construction of the clause; and quite apart from the proved usage, we think the latter is the construction." The proof given in that case by underwriters and others was that "there has been in the

(1) Law Rep. 1 C. P. 535, at p. 542; in Ex. Ch. 2 C. P. 357.

business of marine insurance, a well-known and definite meaning affixed by long usage between the assured and the underwriters to the term 'particular average' as distinguished from the term 'particular charges;' 'particular average' denotes actual damage done to or loss of part of the subject-matter of insurance, but it does not include any expenses or charges incurred in recovering or preserving the subject-matter of insurance." (1) The decision in *Kidston* v. *Empire Marine Insurance* (2) was that a loss within the clause was not excluded by a clause exempting from average loss; the reason given being that a loss within the clause is different from, and is in no case to be considered as part of, the loss by reason of actual damage to the subject insured. "By this clause," says Arnold, summing up the authorities, "the insurers undertake an additional liability over and above the insurance properly so called, and quite of a different nature," 2 Arnold, p. 780, 5th ed. "The assured may recover under a marine policy the value at which the subject is insured; and also for the amount of expenditure in addition to a total loss. This liability is stipulated for by the provision that the assured may labour, travel, and sue for the safeguard and recovery of the insured property, to the expense of which the insurers agree to contribute," Phillips on Insurance, s. 1742. These authorities and the decision in *Kidston* v. *Empire Marine Insurance Company* (2) seem to us to shew that the clause in question is a wholly independent contract in the policy from the contract to pay a certain sum in respect of damage done to the subject-matter of insurance, and consequently that it applies, whatever be the amount of such damage, and whether indeed any such damage occur or not. Nothing is said in any of the authorities, and there is nothing in the wording or nature of the clause to shew, that an intention must be present in the mind of those who make the effort to benefit thereby underwriters.

The absence or presence of such an intention cannot diminish or add to the value or effect of the services. Such intention, therefore, is upon reason and authority an immaterial circumstance. The only conditions necessary to give a valid claim under it, are danger of damage to the subject insured by reason of perils insured

(1) Law Rep. 1 C. P. at p. 538.
(2) Law Rep. 1 C. P. 535; in Ex. Ch. 2 C. P. 357.

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against, and unusual or extraordinary efforts made or expenditure incurred in consequence of such efforts made to attempt to prevent such damage. Whether the present occasion was one to give rise to a valid claim under the suing and labouring clause, depends upon whether there was probable danger of loss to the underwriters. Looking at the case, that cannot be doubted. Whether the expense in respect of which the claim is made is such as is within the suing and labouring clause, depends upon whether the liability or obligation to pay for such salvage services as were here rendered is within the clause. Now services which can be rewarded as salvage services can only be such as are rendered when danger exists, and when they are rendered in order to avert danger. They cannot, whilst the master or others in due charge are on board, be properly rendered without the consent of the captain or those in charge. The only difference between them and similar services rendered without a claim for salvage, is that they are rendered without an agreement express or implied, as to the price at which they are to be paid. They are rendered upon the terms that they are to be performed without payment if without success, and to be rewarded by a judgment of the Admiralty Court if successful. But the nature and object of them are precisely within the proposition above enunciated; they are unusual and extraordinary efforts made in a time of danger, and made in an attempt to avert damage, which, if the subject to which they are rendered is insured, would, if it ensued, cause loss to the underwriters. It is not necessary, as has been observed, that there should be a specific intention to benefit underwriters, for salvage services may be rendered without knowledge that the subject saved is insured, and yet are of the same value to the underwriters: they fulfil the conditions just as much as similar services given on terms of remuneration. "Salvage," says 2 Arnold, p. 778, 5th ed. "in so far as it is a claim to which the insurer is liable, designates an expenditure necessarily laid out in preserving the subject of an insurance from a loss, for which the insurer would be liable under the policy, and is recoverable from him in virtue of an express clause in the policy, inserted for such a case, and known as the sue and labour clause." With this we agree. Nothing is said about intention.

It follows, that in this case the defendant was bound to pay, in addition to the 1200*l.*, the amount for which he was liable in respect of the repairs done to the ship, his proportion of the 515*l.*, the amount of "average charges" incurred on behalf of the ship. That seems to be, as urged on behalf of the plaintiff, the same proportion of 515*l.* as 1200*l.* bears to 2600*l.*, or 12-26ths of 515*l.*

It follows that the appeal on behalf of the defendant must be dismissed, and the appeal on behalf of the plaintiff must be allowed.

Judgment accordingly.

Solicitors for plaintiff: *Hollams, Son, & Coward.*
Solicitors for defendant: *Waltons, Bubb, & Walton.*

[IN THE COURT OF APPEAL.]

May 18.

BRICE *v.* BANNISTER.

Assignment of Debt—Payment to Original Creditor after Notice—Supreme Court of Judicature Act, 1873, *s.* 25, *sub-s.* 6.

G. agreed to build a vessel for the defendant, the price of which was to be paid by instalments. Before the vessel was finished, G., being in debt to the plaintiff, by an instrument in writing directed the defendant to pay to the plaintiff 100*l.* out of moneys due or to become due from the defendant to G. At the time of giving this direction all the instalments which were due had been paid by the defendant to G. Notice in writing of the above-mentioned instrument was given to the defendant, but he refused to be bound by it, and afterwards paid to G. the balance of the price of the vessel, amounting to more than 100*l.*:—

Held (by Bramwell and Cotton, L.JJ., Brett, L.J., dissenting), that the instrument in writing constituted a valid assignment of 100*l.*, part of the moneys due or to become due from the defendant to G., and that the plaintiff was entitled to recover that amount from the defendant, notwithstanding the subsequent payments by him to G.

CLAIM stated that John Gough, by an order in writing under his hand, directed to the defendant, bearing date on or about the 27th of October, 1876, absolutely assigned to the plaintiff the sum of 100*l.*, money due or to become due of John Gough in the hands of the defendant, of which order due notice was given to the defendant, and the defendant thereupon accepted the same. At the time of the making of the order in writing and at the time

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of notice thereof to the defendant he was indebted to John Gough in divers sums of money more than sufficient to pay the sum of 100*l.* assigned by John Gough to the plaintiff. The plaintiff had on more than one occasion demanded from the defendant payment of the sum of 100*l.*, but the defendant had not paid it or any part of it.

The nature of the defence appears from the facts hereinafter stated.

At the trial at the Somersetshire Summer Assizes, 1877, before Lord Coleridge, C.J., without a jury, the following facts were proved. The plaintiff is a solicitor at Bridgwater, and the defendant is a shipowner residing at Barrow-in-Furness. The defendant had entered into a contract with John Gough, dated the 17th of May, 1876, by which Gough agreed to build for the defendant a vessel on certain terms. The material part of the contract is as follows: "The vessel to be completed by the 30th of December, 1876, for the sum of 1375*l.* Payments to be made as follows:—

When keel and stern post up and floors across	£250
When in frame	250
When planked	400

and the remainder when completed and handed over with Lloyd's, Board of Trade, and builder's certificates."

The contract was in the course of being performed by John Gough between the date of the contract, 17th of May, 1876, and the completion of the vessel, 11th of February, 1877. The first instalment under the contract became due on the 22nd of June, 1876, the second instalment became due on the 11th of October, 1876, and the third instalment became due on the 23rd of November, 1876, and the remainder was due on the completion of the vessel, 11th of February, 1877.

Gough was unable to finish the vessel without assistance from the defendant, and therefore during the progress of the building the latter advanced to him sums of money, which were necessary to enable him to pay the wages of his workmen employed in building the vessel and to pay for the materials used in constructing her. The total amount of these advances upon the 27th of October, 1876, was 1015*l.* That sum was in excess of the amount then due pursuant to the contract.

On the 27th of October, 1876, Gough, being indebted to the plaintiff to an amount exceeding 2000*l.*, gave the plaintiff an order addressed to the defendant in the following terms:—

"I do hereby order, authorize, and request you to pay to Mr. William Brice, Solicitor, Bridgwater, the sum of 100*l.* out of moneys due or to become due from you to me, and his receipt for same shall be a good discharge."

On the same day, the 27th of October, 1876, the plaintiff gave the defendant written notice of the order in the following terms:—

"I hereby give you notice that by a memorandum in writing dated the 27th of October, 1876, John Gough, of this place, authorized and requested you to pay me the sum of 100*l.* out of money due or to become due from you to him, and my receipt for the same shall be a good discharge."

The defendant acknowledged the receipt of the notice, but declined to be bound by it as an authority to pay 100*l.* to the plaintiff.

Subsequently to the receipt of the notice, the defendant paid to Gough on account of the building of the vessel, pursuant to the contract, sums far exceeding 100*l.*; and unless the defendant had made such payments to Gough, he would not have been able to complete the vessel.

On these facts it was contended by the defendant's counsel that the judgment ought to be entered for the defendant, on the following grounds:—

1. That at the time of giving the order there was nothing due to Gough, and therefore there was nothing which could be assigned by him to the plaintiff by virtue of the Judicature Act, 1873, s. 25, sub-s. 6. (1)

(1) By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6, "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt, or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action

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2. That there was no binding acceptance of the order by the defendant.

3. That had not the defendant made advances to Gough or to his creditors, other than the plaintiff, Gough would never have been in a position to become a creditor of the defendant.

Lord Coleridge, C.J., after consulting Lindley, J., delivered the following judgment:—

LORD COLERIDGE, C.J. In this case I am of opinion that the plaintiff is entitled to succeed.

This is an action brought to recover the sum of 100*l.* due on an order given by a person named Gough on the 27th of October, 1876, authorizing and requesting the defendant to pay to the plaintiff Brice 100*l.* out of money due, or to become due, from the defendant to Gough, and the plaintiff's receipt was to be a good discharge.

The circumstances under which this order was made are these. [The learned judge stated the facts.] Now it appears by the statement which Mr. Cole has made on behalf of the defendant, and which is not disputed on the part of the plaintiff, that certain payments were made, not at the dates fixed by the contract, but at periods to a considerable extent in advance of the payments under the contract. Mr. Cole has furnished a list of them, but the only circumstance that is material for me to consider is, that at the date of the 27th of October, 1876, as much as 1015*l.*—it is better to include the payment made on the 27th of October—had been paid under the contract. That was, no doubt, considerably in excess of the sum which at that time was due. That left the difference between 1015*l.* and 1375*l.* to be paid under the contract.

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from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice, under and in conformity with the provisions of the Acts for the relief of trustees."

It is admitted on the part of the plaintiff, that those payments had been made before the date of the order: it is admitted on the part of the defendant, that payments subsequently to the date of the order were made to a much greater extent—it is immaterial to what extent—but to a much greater extent than 100*l.*

The further facts that are material are, that the notice was given of this order at the date of the order: that the defendant acknowledged the receipt of the order, but did not accept the order in the sense of any attornment to it, or agreeing to be bound by it. He therefore acknowledged he knew of the order, but at the same time declined in terms to be bound by its authority. These are the only material facts necessary for my decision.

It is said on behalf of the plaintiff that he has proved his case. He has shewn there was a contract, there were various sums to become due, after the date of the order, under the contract; that those sums did become due and were not paid to him, although an order was given for the payment of the amount of 100*l.*, the portion of the debt which had been assigned to the plaintiff. On behalf of the defendant it was objected, first, at the date of the order there was no money due, and it seems to be admitted that Gough was overpaid, and nothing was at the time under the terms of the contract owing to him. The words of the order are "out of money due or to become due." It is argued that, in order to satisfy the terms of the statute to which he has referred, the debt must be an existing debt, and an assignment of a debt to become due will not be within the terms of the section. Now that a debt to become due is a chose in action, is clear; and that an assignment of a debt to become due would have been enforced in equity, upon the authorities is clear. I am happy to find that two great authorities cited to me have so decided; but I should have thought it fell within the very nature and definition of the term "chose in action." Lord Hardwicke (1) and Sir L. Shadwell (1) have so decided; that is sufficient for the present purpose. It seems to me that this is distinctly a chose in action, and the fact that the

(1) It is presumed that Lord Coleridge, C.J., referred to *Row* v. *Dawson*, 1 Ves. Sen. 331; 2 W. & T. (L. C. in Eq.) 726, 5th ed., and *Lett* v. *Morris*, 4 Sim. 607.

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actual sum which was assigned under the order had not become due, is not material in reference to the power of the plaintiff to enforce it.

Next, it is said that there was no acceptance of the order. In one sense that is true. There was no acceptance. That, again, does not appear to me to be material, because if the debt was a chose in action, and if there was an assignment of it, the Judicature Act, 1873, s. 25, sub-s. 6, is directly in point, and there need be no acceptance and no agreement on the part of the debtor, express notice having been given. Therefore it seems to me that the first objection has no foundation, and the second falls with it.

Then the third objection is, that in order to give occasion for the payment of the sums, a portion of which was assigned, advances had been made by the debtor in the interval, and the assignor never would have been in a position to become a creditor but for those advances, and it is argued that shews an equity in favour of the defendant, because he is the meritorious cause of the payment. It appears to me that that argument does not bear investigation, and this becomes apparent upon referring to the date of the order and the date of the receipt of the notice. It is admitted that the 1015*l.* only had been paid, and subsequently to the receipt of the notice the defendant chose to advance to Gough sums of money without regard to the order. He did that in his own wrong, for he knew that to the extent of the order the contract, on which by hypothesis the advance was made, was gone from Gough, and that the contract to that extent was no longer a security in favour of the latter; therefore to the extent of 100*l.* the defendant was lending money on no security, and it appears to me that no question of priority arises. This last point has no substance in it, and I must decide it against the defendant.

A material point remains to be considered, which was probably intended to be raised before me, but was not put very prominently forward, but which it is fit I should notice. [The learned judge read the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 6.] The legislature uses the words "any absolute assignment," and it may be said that an absolute assignment does not include what in strictness is rather an agreement to assign a debt when it arises,

than the present assignment of a debt that has arisen. When, however, the general object of this section is looked at, and when one remembers that the reason of it was to give a right to an action at law in cases which would have been the subject-matter of a bill in equity, and when it is recollected that an agreement in equity to assign a future debt would have been enforced, it appears to me that it is no straining of the words of this section to construe the request to pay as an absolute assignment of a debt or chose in action, the words of the enactment being not merely "a debt," but also "chose in action," and I think that it was intended to include a case of this kind. I do not think I am straining the words of this section in holding that this order is within their meaning.

It is necessary to have recourse to the enactment, because at law no action could have been maintained without the assent of the assignor, and in equity, I apprehend, though I speak here with great diffidence, that without joining the assignor no bill could have been enforced for want of parties. Therefore I could not decide this case without the aid of the enactment. The general jurisdiction of the High Court and the abolition of the general lines of demarcation between law and equity and the authority of a Vice-Chancellor would not have enabled me to decide this case in favour of the plaintiff. But for the section I must have looked on this action as a bill in equity, to which the only parties were the present plaintiff and the present defendant, and which therefore could not have been maintained for want of proper parties. I therefore rely on the terms on this sub-section, and not on the general authority of the High Court.

For these reasons I direct that the judgment be entered for the plaintiff for 100*l.*

The defendant appealed.

Jan. 28, 29. *Cole, Q.C.*, and *Bullen*, for the defendant. The document signed by Gough was not an absolute assignment of a "debt or other legal chose in action" within the meaning of the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 6. It resembled a cheque, which is a mere order to pay, and confers in

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equity no title upon an assignee as against the drawee: *Schroeder* v. *Central Bank of London* (1), following *Hopkinson* v. *Foster*. (2) An express promise made to a creditor by a third party that he will pay to the former money thereafter to be received for the debtor, is not an assignment in equity: *Rodick* v. *Gandell*. (3) The last clause giving the debtor power to interplead or pay money into court under the Trustee Relief Acts, shews that the legislature intended to confine the operation of sub-s. 6 to debts already due.

A. Charles, Q.C., and *Herbert Reed*, for the plaintiff. The document by its very terms was a good assignment in equity of 100*l.*, to be paid out of any money due either at its date or thereafter from the defendant to Gough. The doctrine that a debt was assignable in equity upon notice, was established by many decisions before the Judicature Acts, of which one of the latest is *M'Gowan* v. *Smith*. (4) The defendant's counsel have referred to *Rodick* v. *Gandell* (3), but that case is very distinguishable in its facts. The promise relied upon was not made by a person who owed money to the debtor.

[COTTON, L.J. *Rodick* v. *Gandell* (3) was a very different case from the present.

BRAMWELL, L.J. It is not an authority against the contention for the plaintiff.]

The plaintiff relies upon *Yeates* v. *Groves* (5) and *Lett* v. *Morris* (6), in which orders to pay were supported in equity. This case does not raise any question as to the property in the ship built by Gough, and therefore *Clarke* v. *Spence* (7) does not assist the view presented upon behalf of the defendant.

Bullen replied.

Cur. adv. vult.

May 18. The following judgments were delivered:—

COTTON, L.J. The letter of the 27th of October is a good equitable assignment by Gough to the plaintiff of money to the

(1) 34 L. T. (N.S.) 735; 24 W. R. 710.
(2) Law Rep. 19 Eq. 74.
(3) 1 De G. M. & G. 763.
(4) 26 L. J. (Ch.) 8.
(5) 1 Ves. 280.
(6) 4 Sim. 607.
(7) 4 A. & E. 448.

extent of 100*l.*, which might become due under his contract with the defendant. To this extent he thereby anticipated the moneys payable from the defendant to him, and Gough became incompetent to deal with these moneys to plaintiff Brice's prejudice, and the defendant, after notice of the letter, could not come to any agreement with Gough dealing with or anticipating these moneys to the prejudice of the plaintiff. At the time when notice of the letter of the 27th of October was given to the defendant, the balance of the contract price which remained unpaid exceeded 100*l.*, and the ship has been completed under the contract. The question is, whether in substance what has been done by Bannister and Gough was not a dealing with the moneys payable under the contract; I think it was. The contention of the defendant was that though, after notice of the assignment to the plaintiff he had paid moneys exceeding 100*l.* to Gough, he did so not in payment of the price or under the contract, but that the advances were necessary in order to secure the completion of the ship. But this is not a case where the builder having failed in his contract the person for whom he was building put an end to the contract and completed the work. In such a case, the builder if he in fact completed the work, would be employed as agent or servant doing the work for the owner of the vessel. Here the builder completed the work as contractor building under a contract with the defendant, and this is the distinction between this case and *Tooth* v. *Hallett* (1) where the work was completed after the bankruptcy of the builder by his trustee out of his own moneys, and the person for whom the work was done had power to take possession and employ any one to complete the building, and in effect he did so, and the Court allowed the expenditure against the equitable assignee. It is probable that Gough would not, unless he had obtained the advances made by the defendant either from him or from some other person, have been able to complete the vessel; but a charge for the money lent after the 27th of October by any other person for the purpose of paying wages or buying material necessary for the completion of the ship, and in that sense necessary to enable the money to become due to Gough, could not be preferred to the plaintiff's claim. Moneys paid for the same purpose to Gough by

(1) Law Rep. 4 Ch. App. 242.

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the defendant cannot, in my opinion, stand in a better position. It was urged that the assignee of a chose in action takes subject to all equities. But these must be equities existing or arising out of circumstances existing before notice is given of the assignment; the advances made by the defendant were in no way sanctioned by the contract, and in no sense an equity between Gough and the defendant existing or arising from circumstances existing at the date of the notice to the defendant of the assignment to the plaintiff. The plaintiff was assignee for value of the moneys payable under the contract, without any deduction for cost of materials or other costs of construction. The defendant, for his own purposes, determined not to complete the ship himself, but to let Gough do so under the contract. To enable him to do so he, after notice of the assignment to the plaintiff, paid money to Gough so as to exhaust the contract price. By so doing, he could not, in my opinion, defeat or prejudice the plaintiff's right, and the judgment appealed from must in my opinion be affirmed.

BRETT, L.J. I am sorry to say that, with great hesitation, I differ from the judgment which has been read. I consider the principle involved in this case to be of the highest importance. The defendant and Gough were parties to a contract for building a ship, the price of which was to be paid by instalments at different stages of the building, and the ship was to become the property of the purchaser according to the different times of the payments. Before the ship was finished the builder, through want of funds, became unable to proceed with the work. I do not mean to say that there is any finding that the defendant as purchaser was compelled to take possession of the ship if he did not advance money; but practically if he did not advance money the ship must have been thrown upon his hands, and he must have completed the building of the ship, a most onerous charge upon him. It is an ordinary mode of meeting a difficulty of this kind, an ordinary mode of transacting business, either that the purchaser shall take the ship into his own hands, or that he and the builder shall agree to modify the contract, so that he, instead of paying the purchase-money after a stage of work is completed, should advance the money beforehand; or, as it may be put in another

way, the purchaser, when the builder is in difficulties, before the time of payment fixed by the contract has arrived, advances money upon the terms that he is to repay himself out of the money which he would have to pay when a particular stage is completed. It is true that the builder, in consideration of money previously advanced by the plaintiff, made an equitable assignment to him of the money which would become due to him at a following stage, and he afterwards did procure an advance before the appointed time from the defendant, in order to enable him to complete the ship. It is true that the defendant had notice of this so-called equitable assignment; but it was a matter between the builder of the ship and a third person, over which the defendant, the purchaser of the ship, had no control; and the question is whether we are to allow an equitable doctrine to hamper and impede an ordinary business transaction. I cannot bring myself to agree that, either by virtue of the Judicature Act or otherwise, business transactions are to be hampered by any doctrine which will prevent a man from doing what he otherwise might do, merely because something has happened between other parties. I would therefore confine this remedy to a case where a debt has actually accrued due from one person to another, or at least I certainly would confine it simply to the case where nothing remains to be done by the person who is the assignor. In that case nothing remains to be done by him but to receive money from the person who is to pay him, and that money he makes over to the equitable assignee. But I cannot bring my mind to think that this doctrine should be extended, so as to prevent the parties to an unfulfilled contract from either cancelling or modifying, or dealing with regard to it in the ordinary course of business. I quite agree that they ought not to be allowed to act malâ fide for the purpose of defeating an equitable assignee; but if what they do is done bonâ fide and in the ordinary course of business, I cannot think their dealings ought to be impeded or imperilled by this doctrine, and it seems to me the purchaser of a ship and the builder might have cancelled the contract even after this assignment. Why may they not modify it? If they cannot modify it, it seems to me to denote a state of slavery in business that ought not to be suffered; but I apprehend the

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parties to the contract can modify it. If they can modify it, why may they not act so that no money shall be due from the defendant in this case to the plaintiff? It seems to me there never was any money due to the assignor of the plaintiff. Before that money became due, it was absorbed either by an advance made bonâ fide by the present defendant to the builder, or by a modification of the contract. The builder never could have sued this defendant for money due to him as for a debt; and therefore it seems to me no equitable assignment ought to be allowed to charge the defendant and make him practically pay twice over.

In what cases has this equitable doctrine been applied? Suppose a man writes upon paper, "I promise to pay A. B. the sum of 100*l.* on demand:" the document, not being payable to bearer or to order, is not a promissory note, assignable or negotiable by statute or the law merchant. Has any Court of Equity ever held, that if a person received such a paper it could be sued upon after being handed over to a third person? But this equitable doctrine would make a promissory note not payable to bearer an order transferable to a third party, without any writing upon it, and I apprehend that is directly contrary to all practice, custom, and law, and shews that this doctrine is not to be allowed to control or hamper ordinary business transactions.

I am, therefore, of opinion in this case the doctrine ought not to be allowed to hamper and impede the ordinary transactions which occurred between the defendant and the builder. The defendant had a right, with the consent of the builder, to modify this contract, and he modified it so far and to such a degree that no money was ever due from the defendant to the builder, and therefore the equitable assignment by the builder to the plaintiff had no legal or binding effect whatever. Therefore I am of opinion that the defendant in this case is entitled to succeed.

BRAMWELL, L.J. I have reluctantly come to the conclusion that this judgment should be affirmed. I say reluctantly, because I feel the great force of my Brother Brett's observations; it does seem to me a strange thing and hard on a man, that he should enter into a contract with another and then find that because that other has entered into some contract with a third, he, the first

man, is unable to do that which it is reasonable and just he should do for his own good. But the law seems to be so; and any one who enters into a contract with A. must do so with the understanding that B. may be the person with whom he will have to reckon. Whether this can be avoided, I know not; may be, if in the contract with A. it was expressly stipulated that an assignment to B. should give no rights to him, such a stipulation would be binding. I hope it would be. But as there is no such clause in the contract here, the plaintiff has undoubtedly certain rights—to what? If it were only to money payable according to the terms of the contract, the plaintiff would fail, for no money ever became due according to the terms of the contract. It was paid in advance before the work was finished; so that an amendment of the statement of claim is necessary; and in strictness the plaintiff's case is this: "You, the defendant, had no right to pay in advance; you were bound to wait till the work was finished; you would then owe Gough money, and would then be bound to pay me." This seems to be the law, and certainly if Gough and the defendant had agreed to anticipate the time of payment to defeat the plaintiff, such a scheme ought not to succeed. On the other hand, if Gough had broken his engagement, or threatened to break his engagement to finish the vessel, or to finish it in a reasonable time, and the defendant to remedy and avert such breach, reasonably and bonâ fide, not to defeat the plaintiff but to protect himself, advanced money to Gough before it was due, so that it never became due according to the contract, I should have hesitated long before holding that the defendant was liable in this action. But in reading the correspondence I cannot see that this was the case. That the defendant acted bonâ fide I doubt not, but I think his advancing of the money as he did was quite voluntary and in no sense compulsory. I concur, therefore, in affirming the judgment.

Judgment affirmed.

Solicitors for plaintiff: *Reed & Lovell, for Reed & Cook, Bridgewater.*

Solicitors for defendant: *Chester & Co., for R. B. D. Bradshaw, Barrow-in-Furness.*

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May 14.

[IN THE COURT OF APPEAL.]

WINGATE, BIRRELL, & CO. *v.* FOSTER.

Marine Insurance—Risk not covered by words of Policy—Deviation.

A policy of marine insurance stated the risk to be on four pumps "at and from Ardrossan to the *Alexandra* steamer ashore in the neighbourhood of Drogheda, and while there engaged at the wreck and until again returned to Ardrossan by the *Sea Mew* salvage steamer, beginning the risk from the loading on board the said ship $\frac{\text{and}}{\text{or}}$ wreck, including all risk of craft and for boats to and from the vessel and while at the wreck":—

Held, that the words of the policy did not include the risk whilst the pumps were on board the wreck on a voyage to Belfast, a port of safety.

ACTION on a policy of marine insurance to recover the sum of 100*l.* insured on four steam pumps valued at 2000*l.*

At the trial before Field, J., during the Michaelmas sittings, 1877, in London, the following facts were admitted.

In January, 1877, a steamer named the *Alexandra* having been wrecked at Clogher Head, near Drogheda, the plaintiffs, who are the representatives of the London and Glasgow Steam-pump and Salvage Company—a company formed for the purpose of conducting salvage operations—engaged to raise the wreck, and for this purpose sent the *Sea Mew*, a salvage steamer belonging to the company, with the pumps and other apparatus on board, to the wreck.

On the 12th of January the plaintiffs effected an insurance on the pumps at Lloyd's, and the defendant underwrote the policy for 100*l.* The material parts of the policy were as follows: "*Sea Mew* salvage steamer. Ardrossan to *Alexandra* (s.) ashore Drogheda; whilst employed and back. Four steam-pumps, engines and fitters complete, valued at 2000*l.* Lost or not lost at and from Ardrossan to the *Alexandra* steamer ashore in the neighbourhood of Drogheda and whilst there engaged at the wreck and until again returned to Ardrossan . . . . the risk beginning from the loading on board the *Sea Mew* upon the said ship $\frac{\text{and}}{\text{or}}$ wreck, including all risk of craft and for boats to and from the vessel and whilst at the wreck, each being treated as separately insured."

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The *Sea Mew* with the pumps, &c., sailed from Ardrossan on the 11th of January and arrived at the wreck the next day. The pumps were put on board the *Alexandra* and she was raised and floated on the 29th of January. On that day the *Alexandra*, with the pumps on board, started for Ardrossan towed by tugs, the *Sea Mew* towing astern for the purpose of steering. She met with very bad weather, and it was deemed advisable for her safety that her course should be altered, and that she should endeavour to make for the port of Belfast; the bad weather still continuing, before she could reach Belfast she foundered with the pumps on board.

On these facts the learned judge directed a nonsuit (1) to be entered, on the ground that the loss did not form part of the risk covered by the policy.

May 13 and 14. *Cohen, Q.C.*, and *J. C. Mathew*, for the plaintiffs. The learned judge was wrong to nonsuit the plaintiff. The underwriter must have known that these pumps were to be used at the wreck, and that it is usual to keep the pumps on board after the wreck has been raised, and that the wreck must be taken to a place of safety before the pumps can be taken out of her. The policy being a document of a mercantile character must be construed with reference to the surrounding circumstances; and as a matter of fact it was the intention of the parties that the pumps should be insured until the wreck was taken to a place of safety. The words are: "and while there engaged at the wreck;" those words must receive an extended construction. They mean that the insurance was to hold good so long as the pumps could be of any service in the work of salvage. The underwriter undertakes a liability so long as the subject-matter of insurance is employed for any purpose ancilliary to the voyage insured: thus it may cover

(1) During the hearing in the Court of Appeal it was intimated by Brett, L.J., that the plaintiff having been nonsuited at a trial before a judge and jury, the application for a new trial ought, in the first instance, to have been made to the Queen's Bench Division, and that the action had not been tried by a judge without a jury within the meaning of the Rules of the Supreme Court, December, 1876, Order XXXIX., Rule 1. The Court, however, heard the case on the merits. It has since been decided in *Etty* v. *Wilson*, to be hereafter reported, that upon a nonsuit at a trial before a judge and jury the application must be made to the divisional court.

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goods during a transit upon land: *Rodoconachi* v. *Elliott* (1), and, à fortiori, a plaintiff ought to recover in respect of the pumps, which during the whole time of the risk were at sea.

Butt, Q.C., and *McLeod*, for the defendant. The learned judge was right in nonsuiting the plaintiffs. The question is one of law to be decided by the judge: if the question suggested had been left to the jury, they would in fact have been asked to construe the policy. The policy is not simply a voyage policy or a time policy; it partakes of both characters—it is a voyage policy from Ardrossan to the wreck, a time policy while there on the wreck, and a voyage policy on board the *Sea Mew* from the wreck to Ardrossan, and it does not contemplate a third voyage on board the wreck to Belfast or any other port of refuge. In *Rodoconachi* v. *Elliott* (1), the policy contemplated a land transit by naming the places to which the goods were to be carried. If the parties desired to cover a voyage to a port of refuge, they ought to have used apt words, as pointed out in *Pearson* v. *Commercial Union Assurance Co.* (2)

J. C. Mathew, in reply.

BRETT, L.J. I am of opinion that Field, J., was right, and that there was no question to be put to the jury, which would have enabled the Court to bring the loss which did occur within the terms of this policy.

In order to express my view of what was not within the policy, I think it advisable to state what I think was within the policy. I think upon the words "upon the said ship $\frac{\text{and}}{\text{or}}$ wreck," if I take this to be only a voyage policy, that the loss during any part of the voyage described either on the steamer or on the wreck would be within the protection of the policy. Of course, as a matter of fact, the first part of the voyage described cannot apply to the wreck, but that is not on account of the construction of the policy, but on account of the fact that the pumps could not be on board the wreck on the part of the voyage, which is described as "at and from Ardrossan to the *Alexandra* steamer ashore in the neighbourhood of Drogheda." The beginning of the description of the voyage is "at and from Ardrossan to the *Alexandra* steamer

(1) Law Rep. 9 C. P. 518. (2) 1 App. Cas. 498.

ashore in the neighbourhood of Drogheda." It next describes that which is not strictly speaking a voyage, but is part of the voyage. There is always a difference between the actual voyage and the voyage insured, and here, as in the case of *Rodoconachi* v. *Elliott* (1), the place described, or the period of time which is described to elapse at the wreck, although it is no part of the voyage—that is a sailing voyage—is a part of the voyage insured, and, as in that case, the journey through France to Boulogne, although not part of a sailing voyage in fact, was part of the voyage insured. Therefore the second part here is part of the voyage insured, and that part is "and whilst there engaged at the wreck." Now, taking this part of the policy, it seems to me that this policy would have covered a loss under that part of the voyage described either on board the wreck or on board the steamer, or whilst the pumps were in boats going from the steamer to the wreck, or from the wreck to the steamer. It would have covered any of those losses at that place. But it seems to me, that that part of the voyage described, is confined entirely to the place where the wreck was, and that that part of the policy clearly cannot be applicable to any loss which could occur at any other place, as, for instance, after the ship had left that place. How it can be said that it is confined to a loss which must occur before the ship is afloat and able to float, and that it is to cease the moment she can float or is able to float at that place, I cannot conceive. It would cover any loss on the wreck whilst the pumps were at that place for that purpose, and not for any indirect purpose, but it does not cover anything beyond.

Now, the doubt which I have had from the beginning—and at first I had considerable doubt—was, whether upon proof of certain facts, the next words, "and until again returned to Ardrossan," might not cover the loss which did occur, which was whilst the ship, or wreck, was going to a port of safety, and not going to Ardrossan. That those words would cover a loss, if the pumps had been taken to Ardrossan, either upon the wreck or upon the steamer, I confess I have a strong opinion. I think that they would have covered a loss if the wreck had been taken back to Ardrossan, inasmuch as the goods are insured upon the ship and

(1) Law Rep. 9 C. P. 518.

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on the wreck. I do not think that those words confine the voyage to a voyage on board the steamer.

Now, if the words had been "and back again to Ardrossan," I cannot help thinking then that it would have been confined to a voyage from the place to Ardrossan, and then it would have been clear that it would not have covered this loss; but these are the words which gave rise to a doubt in my mind "and until again returned to Ardrossan." It seemed to me that those words might be construed with a view rather to time than to track. But they are words which certainly can be construed only to cover a voyage from the place of the wreck back to Ardrossan. They are not words, which naturally describe any other voyage.

Then what is it that we must do if we hold that this loss is within those words? This construction would call upon us to say that they do cover a voyage to another place, and from that place to Ardrossan. This construction seems to me to lay itself open to the observation of Mr. Butt that it is a voyage of an undescribed extent, in an undescribed direction, and if it could be taken to describe the voyage to Belfast it could be taken to equally well describe a voyage to Glasgow and the Clyde. Are we entitled so to construe this policy, or this description of the voyage insured, as to add such a voyage to it? For I think that it would add a voyage. Now it seems to me this cannot be done. In *Rodoconachi* v. *Elliott* (1), no voyage was added. It being proved that there was only one journey—one mode of getting from the place from which the goods were brought to London, which was ever used, then, inasmuch as that was really and practically a voyage from the place where the goods were shipped viâ Marseilles to London, considering the description, it could not be meant to apply to ships going round from Marseilles to London, it was only applying the description which was in the policy to the journey which was actually taken.

In the case which has been cited to us of *Pearson* v. *Commercial Union Assurance Co.* (2), there was the term "with liberty to go into dry dock," and it was construed that that would mean of itself, with liberty to go to the dry dock and to go back. There was therefore a description of something—of a track, as may be

(1) Law Rep. 9 C. P. 518. (2) 1 App. Cas. 498.

said, which was mentioned in the policy; and all that the judges there said was that those words would cover every usual, although not necessary, mode of performing that voyage; but they said that something which was not a part of that voyage so described, although usual, and as I understand them to say, even although necessary, was not part of that voyage described, and could not be added to the policy; that is to say, although in construing what is in the policy, proof may be usual of what is the usual or necessary mode of doing that which is described, yet nothing, however usual or necessary, must be added which is not described in the policy. Therefore, even if it had been proved that it was usual for pumps when they were taken out to a wreck to be carried on board the wreck to a port of refuge, or, if it had been proved that it was absolutely necessary in order to complete the operation that they should be so carried, I say, that even admitting that everything which Mr. Mathew could hope to prove, could have been proved in this case, still they would be part of the operation which must be performed in a locality which is not described in the track of this voyage insured; and that therefore we should be called upon not to determine how something which is described can be performed or done, but we should have to add to the policy something to be done in a place of which there is no description in the policy. If there had been the words "with liberty to go to a port of refuge," we might then have heard evidence of whether it is usual or necessary to keep pumps on board a wreck. But here, inasmuch as this loss happened in a locality of which there is no description given in the policy, we cannot add that locality to the place within which a loss can be covered under this policy; and therefore I think we are called upon to do that which the Court cannot do, and that the judgment therefore of my Brother Field must be affirmed.

With regard to the question of the power of the Court, to have sent this case for a new trial, it is unnecessary to express any opinion on the present occasion.

COTTON, L.J. This is an appeal from a nonsuit by Field, J., and the appeal was argued on two grounds. It was contended on the facts opened, which were taken as if proved or found by the

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jury, that the judgment ought to be entered for the plaintiffs and not for the defendant; but if that is not so, that we ought to send the matter back for a new trial, on the ground that there were facts that were material to enable the Court to form a judgment, which were not opened or proved in consequence of the view which the learned judge took.

Now the question is, what liability has the defendant undertaken by this contract of insurance? That is a question of construction. I first take the question of the construction of this contract, and see whether or no, on the construction, without any new facts, the plaintiffs can say that the risk in which these pumps were lost was within the contract. I think no reliance whatever can be placed on the fact that the *Sea Mew* is described as a salvage steamer. We find three kinds of risk insured against. There is the voyage from Ardrossan to the *Alexandra* steamer, which is described as being ashore in the neighbourhood of Drogheda. And then we find "and while there engaged at the wreck." That refers to the operations and use of the pumps at and on board the wreck. But we should be doing violence to the words if we considered that that clause included the risk on board the wreck when she was afloat and was going to a port of refuge; because these words, "and while there engaged at the wreck," are much more appropriate to the operations at the place of wreck, than the operations on board the wreck when she was afloat and was going to some port of refuge.

Then we come to the third kind of risk, "and until again returned to Ardrossan." I think if the plaintiffs can make out that the risk was covered by this policy, it must be under those words, "and until again returned to Ardrossan." But the risk and voyage in which the pumps were lost was not at all undertaken for the purpose of returning the pumps to Ardrossan, but entirely for a collateral purpose, that is to say, for taking the ship *Alexandra* into a port of safety, in order there to have her repaired, and if she was not able to be taken back to Ardrossan, to be taken into some other place of safety for that purpose. That makes this case very like the case of *Pearson* v. *Commercial Union Assurance Co.* (1), in which it was said that the policy did not cover the

(1) 1 App. Cas. 498.

delay for the purpose of attaining the collateral object, however usual and convenient it might be. Here the plaintiffs had in returning back to Ardrossan undertaken a different voyage in putting the ship into a place of safety. That voyage, in my opinion, is not covered by the policy.

But ought we to send the case back for a new trial? The facts were all found and admitted, and the parties having elected to put their case on a matter of construction without further evidence, cannot come to the Court of Appeal for a new trial. But in the present case it is not necessary for us to say whether we ought in our discretion to send this back for a further investigation of the facts, because the plaintiffs have not shewn that they can prove any case, which ought to induce the Court on the construction of this instrument to come to a different conclusion from that at which the learned judge and this Court have arrived on the facts which have been stated. Sometimes in construing a policy of insurance it may be necessary to give evidence of the course of business; and the expediency of adopting this course is well illustrated by *Pearson* v. *Commercial Union Assurance Co.* (1) and *Rodoconachi* v. *Elliott* (2). But in the present case no evidence of usage could extend the words of the policy so as to cover the voyage to Belfast. Therefore, I think, on the facts which were before Field, J., the judgment was right, and there is no ground whatever for our disturbing it.

THESIGER, L.J. This case comes before us by way of appeal from the decision of the learned judge on the facts stated in the opening, and which, for the purpose of the ruling of the learned judge, were treated by him and admitted by the defendant's counsel as being true.

Two questions therefore arise: first, what is the reasonable inference to be drawn as to the intention of the parties apart from the words of the policy and upon the facts stated in the opening; and, secondly, what is the true construction of the policy with reference to the facts so stated and admitted?

Now I agree with what has fallen from Mr. Mathew, that we ought not to scan very nicely the language which was used in the

(1) 1 App. Cas. 498 (2) Law Rep. 9 C. P. 518.

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opening, which was an opening for the purpose of placing the case before the jury, although subsequently it was treated as his statement of facts, and was treated as the basis upon which the judgment was to proceed. But taking the opening in the most liberal manner, it seems to me that the facts only amount to this :—There was a steamer ashore in the neighbourhood of Drogheda. There was an arrangement of some kind (the details of which have not been proved) under which pumps were to be sent to the place where the wreck was, for the purpose of assisting in raising the wreck. For the purpose of raising a wreck it is not at all an uncommon thing to do what is called to "platform" the vessel, but on the other hand, these steam pumps might have been used, and the vessel might have been raised according to what the parties might reasonably contemplate without any platforming of the vessel. Again, one might well imagine, that under certain circumstances, after a vessel has been raised, it may be a very reasonable and proper thing for the safety of the vessel so raised, to keep the pumps which have assisted in the raising on board, and to use those pumps until the vessel is brought into a port of refuge. But, on the other hand, it would be a very common and ordinary thing for vessels to be raised by means of those powerful steam pumps, and when the vessel is raised, appliances to be used for the purpose of stopping the leak, which would then and thenceforward entail no necessity for the pumps remaining on board, and in which case the pumps might be taken back to the place from which they had been brought for the purpose of using them on the wreck.

I cannot gather from anything that has fallen in the arguments of the learned counsel that the facts could be in any material way altered, and it is impossible to gather from the facts themselves that it was actually contemplated by either of the parties to the contract which was made by this policy of insurance, that the pumps should be used on the wreck, and should be subsequently used in taking the wreck, or assisting in taking the wreck, from the place where she was wrecked to a port of refuge.

That being so, the sole question which remains to be decided is, whether upon the true construction of this policy, the underwriters have contracted not only for a voyage to the wreck in the *Sea Mew*, not only for the use of the pumps on the wreck at the

place where she had been stranded, not only for a voyage from the wreck when they had done their work at that place, but also for any voyage which might be thought proper for the purpose of taking the wreck after she was raised into some port of refuge, which might be entirely foreign to the course of the voyage of the pumps back to Ardrossan.

Now, we should be doing violence to the language which has been used by these parties, if we were to hold that the loss was within the terms of the policy. The words are plain and distinct. The voyage is first mentioned. It is a voyage in the first place "at and from Ardrossan to the *Alexandra* steamer ashore in the neighbourhood of Drogheda." Therefore the terminus of the voyage is distinctly mentioned, and that terminus is the locality in which the wreck was then situate. Then it goes on to describe the risk in the policy further, "and whilst there engaged at the wreck." Now there is no doubt that under the words "whilst there engaged at the wreck," the policy would not cover the use of these pumps anywhere other than in the vessel which is mentioned immediately before in that clause. But in a later part of the policy, we find that when the parties are speaking of the protection being given while the pumps are upon the ship, they also add the words "or wreck;" and therefore, it appears to me, and it has not been practically disputed in the arguments before us, that the policy does cover the use of the pumps, not only while they are on the *Sea Mew*, but also while they are on the wreck at the spot at which it had been stranded, and that in the clause to which I have just referred, where the words "or wreck" are used, it is made a little more plain, because I find this expression also used, "and all risk of craft, and all boats to or from the vessel, and whilst at the wreck," there again pointing very strongly to the use of these pumps in connection with the wreck, and on the wreck only in the locality in which the wreck was then situate. Then we find a provision as to the return voyage. The words are, "and until again returned to Ardrossan." What is the meaning of those words? "Returned" imports some place from which the pumps are returned, and there is no place from which those pumps could be returned mentioned in the policy, unless we take the words precedent, "whilst there engaged at the wreck," and hold that the return must be from the

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place which was the terminus of the voyage out; and it would be impossible to hold that the parties did in these words contemplate that there should not only be the voyage out, and not merely also be the voyage home, but also a third voyage, which although reasonable in connection with the safety of the wreck, was still a voyage which might take the vessel entirely out of her course, although in the particular instance it seems to have been somewhat in the course to Ardrossan. Such a voyage cannot come within the simple and distinct words which have been used.

Two cases have been cited. Neither of those assist the argument on behalf of the plaintiffs; one of them seems to me strongly opposed to it. The latter is the case of *Pearson* v. *Commercial Union Assurance Company* (1), and there it was argued, that what was done was within the contemplation of the parties, because it was proved as a fact, that what was done was usual and proper under the circumstances to which the policy applied. There a policy covered the loss by fire in the Victoria Docks, and also in any dry dock to which the vessel might be taken for the purpose of repair; and it was found as a fact that as an ordinary incident of taking a vessel to and from a dry dock, if the vessel was large the paddle-wheels in part had to be removed, and that when paddle-wheels were removed, it was usual and proper to allow the paddle-wheels to be taken off in the river instead of in the dock. "She was, when lost, moored in the Thames for purposes no doubt very usual and proper," says Blackburn, J., in the Exchequer Chamber (2), still, unless the parties have used apt words shewing that they intend to extend the locality of the risk, the fact of its being usual and proper cannot make the risk cover that which does not come within the words of the policy. And Lord Chelmsford, in the House of Lords (3), says: "I agree with what was said by Blackburn, J., in the Exchequer Chamber, that if the parties wished to cover the risk while the ship was so moored, they should have provided for it by appropriate words in the policy. Whether the underwriters would have undertaken this risk it is impossible to say; as they were not aware that it would arise there was of course no provision applicable to it."

(1) 1 App. Cas. 498. (2) Law Rep. 8 C. P. 548, 551.
(3) 1 App. Cas. at p. 506.

If the parties were not aware in that case that it would arise, which was a case where what was done was a usual and proper thing to be done, still less would they be aware in this case, where there was nothing whatever to shew that it was usual to use these pumps except for the purpose of raising the wreck. Then Lord Chelmsford further says, "It would be a strong implication to raise against the underwriters, that they necessarily contracted by the policy to extend the locality to which the insurance against fire was expressly confined, upon the ground of a usual practice of dealing with large steam vessels under repair, which they did not know would have to be resorted to on the part of the assured. More especially is this the case, when it appears that the whole work upon the paddle-wheels might have been done in the Victoria Docks." Therefore those expressions seem to me entirely applicable to the present case, and that case almost (if any case could govern a case upon a policy where it turns on the construction of words which are not identical in their terms) appears to me to govern the present case.

But then the case of *Rodoconachi* v. *Elliott* (1) has also been cited. That appears to me to be entirely distinguishable. There silk was insured from Shanghai to London, and there were several parts of the transit mentioned in the policy of insurance, and it was mentioned that the goods might be carried, by the steamers of the Messageries Impériales and viâ Marseilles; and evidence was given in the first place that a transit viâ Marseilles imported a land journey, and, secondly, that transit by means of the Messageries Impériales necessarily imported a land journey, because the invariable and only course that was adopted, as regards transit of goods by that company, was to take the goods to Marseilles and then send them overland through France. Therefore the evidence there is no more than this: it did not shew what the parties contemplated apart, or rather as different from any words which they had used, but shewed what was intended and what was to be imported in the words "a voyage from Shanghai to London, viâ Marseilles, and by means of the Messageries Impériales Company's steamers."

For these reasons it appears to me that the decision of the

(1) Law Rep. 9 C. P. 518.

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learned judge was right. I cannot see that there was really any question which was to be left to the jury, and I cannot see that even if we were to direct a new trial, there could be any facts proved in this case which would make a difference in the decision at which this Court has arrived.

Judgment affirmed.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendant: *Waltons, Bubb, & Walton.*

May 16.

[IN THE COURT OF APPEAL.]

PICKUP *v.* THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED.

Marine Insurance—Unseaworthiness—Loss by Perils of the Sea—Burden of Proof—Presumption—Misdirection.

6 QBD. 55. 11 QBD 446

In an action on a policy of insurance it was proved at the trial that the vessel put back from inability to proceed eleven days after she started on her voyage: the judge directed the jury that the time which elapsed between setting sail and putting back was sufficiently short to shift the onus of proof from the underwriters, and make it incumbent on the assured to prove that the unseaworthiness arose from causes occurring subsequently to setting sail:—

Held, affirming the judgment of the Queen's Bench Division, a misdirection.

Watson v. *Clark* (1 Dow. 336) commented upon.

ACTION on policy of insurance on freight.

Pleas amongst others, 1. That the ship was not lost by the perils insured against: 2. That the vessel was not seaworthy at the time of the commencement of her voyage.

The jury in answer to the learned judge found that the vessel was not seaworthy when she set sail from Rangoon upon the the voyage insured, and that she was lost in consequence of her defective condition operated upon by such weather as was to be expected on the voyage.

An application was made to the Queen's Bench Division for a new trial on the ground of misdirection.

W. Williams, Q.C., W. G. Harrison, Q.C., and *Lodge*, for the defendants.

Butt, Q.C., Cohen, Q.C., and *J. C. Mathew*, for the plaintiff.

The facts of the case and the course at the trial are to be found fully stated in the judgment of Queen's Bench Division.

March 5. The judgment of the Court (Cockburn, C.J., Mellor and Field, JJ.) was delivered by

COCKBURN, C.J. This was an action on a policy of insurance on freight, on a cargo of rice shipped on board the ship *Diadem*, on a voyage from Rangoon to a port in the United Kingdom. Amongst other defences was one of unseaworthiness.

The cause came on for trial before my Brother Field and a special jury, at Guildhall, when, under the direction of the learned judge as to the law applicable to the case, the jury found a verdict for the defendants, on the ground that the vessel was unseaworthy on commencing the voyage.

The facts so far as they are necessary for the present purpose may be stated in a few words.

The ship having conveyed a cargo of coals to Point de Galle, proceeded in ballast to Rangoon, where she loaded a cargo of rice, the freight on which was the subject-matter of the insurance in question. She arrived at Rangoon on the 25th of April, 1874. Amongst other issues in the cause was one of unseaworthiness at the commencement of her voyage from Galle to Rangoon, but that issue the jury decided in favour of the plaintiff, and no question upon that arises here. For the present purpose the ship must be taken to have been seaworthy on her arrival at Rangoon. She remained there till the 4th of June following, when having loaded her cargo, she set sail on the homeward voyage. Between the 9th and 15th of June she encountered severe squalls and a heavy sea, and laboured heavily, and made so much water that the master and crew becoming alarmed for the safety of the ship, and satisfied of her inability to perform the voyage home, determined on putting back to Rangoon. On the 19th of June, when in the Rangoon river, she grounded on the Silva Sand, but was got off again and proceeded to Rangoon, where she arrived on the 20th of June. In the course of the month of July surveys were held on the ship. She was found to be very much strained, and in several places where her copper was off, to be very much worm-eaten, and on the 15th of July she was pronounced to be unsea-

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worthy, and there was no contest as to her having been so at that time. The question was whether the rough weather she had encountered between the 9th and 15th of June, and the straining thereby occasioned, had caused her leaky condition—in which case that condition would have been consistent with her having been seaworthy on starting on the voyage—or whether her leaky state had been brought about by the action of the worms, which, from the defective condition of some parts of her copper, had been able to eat their way into her planks, so as to render many of them in an unsound condition.

Arguing on the latter hypothesis, the defendants contended that this worm-eaten condition must have arisen during the period the ship was loading in the Rangoon river—namely, from the 25th of April to the 4th of June;—the plaintiff on the other hand contending that the leaky state of the vessel was due to the weather she had encountered, and that her worm-eaten condition as apparent on the survey had been produced during her stay at Rangoon between the time of her return thither and the time of the survey—that is to say, between the 20th of June and the 15th of July—the waters there being greatly infested with the species of worms by which wooden vessels are liable to be attacked, and which, owing to portions of her copper having been rubbed off on the occasion of her stranding, had been thus enabled to get at the vessel.

After the close of the evidence and during the address to the jury the question was raised as to the party upon whom in this particular case the onus of proof lay, and the counsel for the underwriters submitted to the learned judge to tell the jury as a matter of law that the onus of proof was in this instance shifted to the plaintiff. This course, however, at that time the learned judge declined to adopt, but left the whole issue to the jury, putting the question of burden of proof to them in the language of Lord Eldon in *Watson* v. *Clark* (1), and laying before them the evidence on one side and the other, necessary to enable them to arrive at a conclusion.

At the close of the summing-up the jury retired to consider their verdict, and after a protracted absence returned into court,

(1) 1 Dow. at p. 344.

saying that they were unable to agree on their verdict. In answer to a question put by the learned judge whether there was any point upon which he could give them any assistance, the foreman asked, "Whether the judge could give them any more precise and positive direction as to which of the parties had the onus of proof cast upon him," upon which my Brother Field again used the language of Lord Eldon, but dealt with it this time as a direction in point of law, and directed the jury as matter of law that, while the presumption of law was primâ facie in favour of seaworthiness, and the burden of proving unseaworthiness was in consequence, in the first instance, on the insurers, yet that if the inability of a ship to proceed on the voyage becomes evident in a short time after her sailing, the presumption of law is that the inability arose from causes existing before she set sail; and that in such event the burden of proof becomes shifted, and that it then rests with the assured to shew that the inability arose from causes occurring subsequently to the commencement of the voyage. And with reference to the particular case, the learned judge directed the jury as matter of law that the time which elapsed between the departure of the ship from Rangoon on the 4th of June, and her putting back on the 15th, was a sufficiently short time to shift the onus of proof, and to make it incumbent on the assured to satisfy the jury that the unseaworthiness of the vessel arose from causes occurring subsequently to her setting sail on the voyage.

We are of opinion that this direction cannot be upheld and that there must be a new trial; and in this view the learned judge on consideration himself concurs.

We do not say that time may not be an element in the consideration of questions of unseaworthiness. If a vessel very shortly after leaving port founders, or becomes unable to prosecute her voyage, in the absence of any external circumstances to account for such disaster or inability the irresistible inference arises, that her misfortune has been due to inherent defects existing at the time at which the risk attached. But this is not by reason of any legal presumption or shifting of the burden of proof, but simply as matter of reason and common sense brought to bear upon the question as one of fact, inasmuch as in the absence of every other possible cause the only conclusion, which can be

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arrived at, is that inherent unseaworthiness must have occasioned the result. Indeed, on closer consideration, it becomes apparent that time enters to a very limited extent only into the question in arriving at this conclusion. If the vessel strikes on a rock or a sandbank immediately after leaving port, or, while still in sight of it, is overpowered by a storm, the shortness of the time which has elapsed since she started becomes at once immaterial. On the other hand, though the vessel may have been at sea days, or even weeks, if during the whole of the time she has had favourable weather, fair winds, and calm seas, and yet goes down, or proves unable to continue on her course, the same inference as to inherent unseaworthiness presents itself as in the former case, though, perhaps, with diminished cogency in proportion as the interval has been longer. But in the latter case, as in the former, the inference arises from the impossibility of ascribing the result to any other cause than the condition of the vessel on starting on the voyage, the interval of time being matter of very secondary consideration, if of any. It is from the entire absence of any other cause than inherent unseaworthiness that the probative value of such a combination of circumstances is derived. Time can enter to a very limited extent only, if it enters at all, into the question as a factor in leading to the result. It certainly cannot be said of itself and without more, to give rise to any new presumption of law, or as matter of law to shift the onus of proof from the party on whom the law has cast it.

This reasoning applies with peculiar force to the case before us. The ship had been at sea eleven days before she put back. Assuming, for the moment, that shortness of time intervening between the departure of a vessel and her inability to keep the sea could shift the burden of proof, we think it cannot be said that an interval of eleven days would be sufficiently short to warrant the application of such a principle, or to raise any presumption independently of other circumstances. In that time—it was the stormy season in the Eastern seas—the vessel might probably have encountered a cyclone. As it was, she was exposed during several days—from the 9th to the 15th of June, to severe squalls and a boisterous sea, and laboured heavily. The question was whether her inability to pursue her voyage, and the unsea-

worthiness, as afterwards ascertained, were due to the action of the winds and waves, in other words to the perils insured against, or to the antecedent causes of unseaworthiness to which the defendants ascribed them. Under these circumstances, the time the vessel had been at sea became a matter of secondary consideration: and if to be taken into account at all, could only be so as an element in the inquiry, and as one of the facts in the case. It could not properly be held to be of itself, and independently of the other facts, sufficient to take the case out of the ordinary rule, and by giving rise to a new presumption to shift the burden of proof from the insurer to the shipowner. As we are of opinion that the direction cannot be upheld, and as it is clear from what took place on the trial that the verdict of the jury was determined by the direction so given, it follows that judgment cannot be given for the defendants on the finding, and that the rule must be made absolute for a new trial.

Rule absolute.

The defendants appealed.

May 15, 16. *W. Williams, Q.C., W. G. Harrison, Q.C.,* and *Lodge,* for the defendants. The order of the Queen's Bench Division is wrong. The jury having found substantially that the vessel was not lost by the perils insured against, it is immaterial whether she was seaworthy at the commencement of the voyage; and therefore, although the direction as to the shifting of the burden of proof of seaworthiness may not have been quite accurate, the defendants are entitled to judgment on the findings. Whether the vessel was seaworthy or not is a question for the jury: *Foster* v. *Steele* (1), and the summing-up of the learned judge can be supported upon the judgments of Lord Eldon and Lord Redesdale in *Watson* v. *Clark* (2); *Parker* v. *Potts.* (3)

Butt, Q.C., Cohen, Q.C., and *J. C. Mathew,* for the plaintiff, were not heard.

BRETT, L.J. I agree with the judgment of the Queen's Bench Division.

A good deal has been said on the argument about "the burden

(1) 3 Bing. N. C. 892. (2) 1 Dow. 336.
(3) 3 Dow. 23.

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of proof" and "presumption." The burden of proof upon a plea of unseaworthiness to an action on a policy of marine insurance lies upon the defendant, and so far as the pleadings go it never shifts, it always remains upon him. But when facts are given in evidence, it is often said certain presumptions, which are really inferences of fact, arise, and cause the burden of proof to shift; and so they do as a matter of reasoning, and, as a matter of fact, for instance, where a ship sails from a port, and soon after she has sailed sinks to the bottom of the sea, and there is nothing in the weather to account for such a disaster, it is a reasonable presumption to be made that she was unseaworthy when she started; and a jury may be properly told that, upon such uncontradicted evidence, they may presume as a matter of reasoning and inference from the facts, the vessel must have been in an unseaworthy condition when she started; that is, when she started she was not in a fit state to encounter the ordinary perils of the voyage, and if a jury, with no other evidence than that I have stated, were to find the contrary, it would not be a finding against any principle of law, but it would be such a finding against the reasonable inference from the facts that it would amount to a verdict against evidence. And as a guide on the question of fact, and the mode in which the jury are to draw inferences, I think the jury might be told what is laid down in 2 Arnould on Marine Insurance (5th ed.) p. 666, namely, that where a ship becomes so leaky or disabled as to be unable to proceed on her voyage soon after sailing on it, and this cannot be ascribed to any violent storm or extraordinary peril of the sea, the fair and natural presumption is that it arose from causes existing before her setting out on her voyage, and, consequently, that she was not seaworthy when she sailed. That is only telling them, if no other facts are shewn, "I should advise you, as reasonable men, to find that the ship was unseaworthy when she started." But the passage in Arnould proceeds to lay down that in such cases it is incumbent upon the assured to shew that at the time of her departure she was in fact seaworthy, and that her inability has arisen from causes subsequent to the commencement of the voyage. Of course, he may be able to shew that she was seaworthy. But the question what is a short time after sailing must surely depend on the circumstances; and it is for the jury

to say whether under the circumstances of the voyage they think that the time of loss was so soon after sailing that it raises the presumption of unseaworthiness.

Let us see whether there is any authority to the contrary. The case cited to us is *Watson* v. *Clark* (1). That case is more often cited for the question of law which Lord Eldon enunciated than for his treatment of the facts. It is cited as an authority for the principle that if a ship was seaworthy at the commencement of the voyage, although she became otherwise only one hour after sailing, the warranty is complied with, and the underwriter is liable. The case also deals with the question of presumption arising from the facts. But Lord Eldon and Lord Redesdale were sitting as a Court of Appeal from a decision of a Court which decided both law and fact, and they were called upon, therefore, as upon a rehearing, not only to determine what the law was, but also whether they agreed with the Court below upon the facts; and thus it is that they give their reasons for agreeing with the findings as to the facts. And when we find Lord Eldon and Lord Redesdale pointing out in the clearest terms a process of reasoning which is almost irresistible, it is a very good guide to a jury to point out to them that process of reasoning as one which they ought to follow. But I have never heard that this case was an authority for shewing that a presumption of fact is really a proposition of law.

Now, if that be so, I think it cannot be denied that my Brother Field so expressed himself, that the jury would consider themselves bound to take it as a matter of law that it was a short time, and a time so short that it shifted the presumption. But my Brother Field, who was a party to the judgment of the divisional court, on consideration, admitted that his direction was erroneous.

As to the question arising upon the issue as to the loss by perils of the sea, it seems to me upon the facts of this case, that when the jury were practically told that as a matter of law they were to take it that she was worm-eaten at Rangoon, unless the shipowner could shew that she was not, that this direction must have had a vital effect upon the finding of the jury upon the loss by perils of the sea, and that, therefore, even though as an abstract

(1) 1 Dow. 336.

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proposition this would not be a misdirection upon that plea, it was such a direction as to lead to a wrong inference of fact: it was such a wrong direction that it would almost inevitably lead to an erroneous consideration of the issue and cannot be satisfactory. Therefore I think there must be a new trial.

COTTON, L.J. I agree that there must be a new trial. I think on two grounds there was a misdirection in the summing-up of the learned judge: first, in telling the jury that the time was sufficiently short to create the presumption that the inability to proceed arose from causes existing before the vessel set sail: secondly, that as matter of law the burden of proof as to seaworthiness became shifted and thrown upon the assured. In my opinion the question of time is a question of fact for the jury, and it is for them to say, judging from all the circumstances, whether they are satisfied that the loss was occasioned by her defective condition on starting on her voyage. The direction of Field, J., I think induced the jury to believe the defendants were relieved from proving their plea of unseaworthiness, and that it was for the plaintiff to shew seaworthiness at the commencement of the risk.

THESIGER, L.J. I agree that this case must go back for a new trial.

There are two questions which the Court have to decide, first, was there a misdirection? and, secondly, did that misdirection, within the meaning of Order XXXIX., Rule 3, occasion substantial wrong or miscarriage, not only on the question raised by the issue of seaworthiness or unseaworthiness, but also upon the issue which was raised as to the cause of loss?

Now, it is convenient, I think, to take those two questions separately, and, first, to consider whether or not there was a misdirection upon the issue of seaworthiness, or unseaworthiness.

What was the position of the facts in the case at the time when the learned judge gave his direction? On the one hand there had been evidence—I do not give any opinion as to the strength or weakness of that evidence—but there had been evidence that the ship had met with some severe weather during the course of the eleven days which elapsed between her leaving Rangoon and

the time when she set sail to return to Rangoon. On the other hand there was evidence that, upon her return to Rangoon, upon the first survey some traces of worming were discovered, and upon later surveys taking place, at a considerable period after her return to Rangoon, her bottom was found to be very seriously worm-eaten, so much so as to be quite sufficient to account for the return to Rangoon.

Under those circumstances, what direction, either in fact or in law, could the learned judge give to the jury? It seems to me that he could not direct the jury that the burden of proof was shifted either in fact or in law. All that he could say was this: "The burden of proof remains as it originally remained, namely, that if there had been no evidence on the one side, or on the other, the plaintiff would have been entitled to a verdict on the question as to whether the ship was or was not seaworthy at the commencement of the voyage. There being evidence on both sides, it is for you, the jury, to consider whether the evidence as to the weather was such as to induce you to think that the loss was due to the weather, and therefore to a peril insured against; or whether the evidence which has been given as to the worming, coupled with the evidence as to the weather, satisfies you that the weather was insufficient to account for the loss, while the worming was amply sufficient." That seems to me to be the whole extent to which, under the circumstances of the case, the learned judge could fairly direct the jury.

That being so, what is the direction he gives them? He tells them, perfectly correctly, that upon the issue of seaworthiness the burden of proof rested upon the underwriters originally. But then he proceeds to tell them that, only eleven days having elapsed since the vessel left Rangoon, and between that time and the time of her return to Rangoon, the burden of proof which originally lay upon the underwriters had shifted, and the burden was thrown upon the plaintiff of shewing that the loss of the vessel was due to the causes which had arisen subsequently to her sailing. The meaning of that was obviously this, that the jury must, from the short time that elapsed after her voyage commenced, presume primâ facie that instead of the vessel being seaworthy, as they would have presumed without any evidence, they

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must presume that she was unseaworthy at the commencement, unless such evidence was given on the part of the plaintiff as to satisfy them that the loss was not due to unseaworthiness, but due to perils insured against. Therefore it appears to me that, although the words "as a matter of law" may have been used, what the learned judge really intended to say was, that the burden in point of fact had been shifted. But even in this point of view it seems to me that the learned judge misdirected the jury, and that there was nothing to shew or to justify him in saying that the burden of proof, as a matter of fact, had shifted, because at the very same time that it was proved that a short time had elapsed since the vessel had started, it was also proved that there was weather which might possibly account for the loss which took place. Therefore, upon the question of seaworthiness, it seems to me that there was a clear misdirection.

Now arises the question, was the misdirection such upon the question of seaworthiness, that it must have necessarily affected the minds of the jury upon the issue as to loss by perils insured against? It appears to me that this question should be answered in the affirmative. In the first place, I think there was a misdirection as regards the issue raised upon the question of the cause of loss, and for this reason. It is perfectly true that upon that issue the burden of proof lies upon the plaintiff, and it may be true that the presumption of unseaworthiness, or the question of the onus of proof upon the issue of unseaworthiness is one that relates, as has been argued, solely to that issue, and does not in any way touch the issue of the cause of loss; but on the other hand this much is clear, that there is no presumption against seaworthiness, and that the plaintiff undertaking, as he is bound so to undertake, upon the issue to prove that the loss was occasioned by a peril insured against, would have fulfilled the burden thrown upon him if he proved that the policy had been effected upon his vessel, that the vessel had started upon her voyage, and that after the voyage the vessel met with such weather as would fully and fairly account for the loss which was sustained by him under the policy. But the position in which the learned judge left the matter to the jury under this subsequent direction placed a very much heavier burden upon the plaintiff, because he had directed the jury that the mere

fact of this short lapse of time was such as to raise a presumption counter to the original presumption of seaworthiness. And logically followed out, that must mean a presumption of unseaworthiness, and consequently the plaintiff instead of undertaking the burden of proving a loss by peril insured against upon a ship which at all events is not presumed to be unseaworthy, although it may not be proved to be seaworthy, was undertaking a burden of proving that loss in respect of a ship, which according to the learned judge's directions was presumably unseaworthy when she started.

For these reasons it appears to me that there was a misdirection upon both points, and the observations which I have just made are sufficient to shew that that misdirection must have been the cause of substantial wrong or miscarriage. Nothing could shew that more plainly than this, that the very point on which the jury seemed to have been in disagreement about when they returned and discussed the matter with the judge, was the point as to on which side the onus of proof lay, and in the argument before us it was stated that the minds of the jury were equally balanced upon this point, that it was necessary to give some direction upon it. If their minds were in that state of equal balance, it follows that is just the occasion when the learned judge must necessarily be most accurate in the language, which he uses to the jury on the point which they discuss with him.

There is only one other matter to which I wish to refer, and that is the question of authority.

The learned judge, in giving his direction to the jury, appears to have relied upon the passage in *Watson* v. *Clark* (1), taken from the opinion given by Lord Eldon, and when the passage upon which the learned judge relies is looked at, I think it is clear to every mind that Lord Eldon was not speaking of a presumption of law, but was speaking of a presumption of fact, or an inference which his mind would be led to from the facts of that particular case. And I think in the use of that expression, "burden of proof," in the cases there has been a little confusion. Burden of proof always remains the same as a matter of law. But while the learned judge has to direct a jury upon the burden of proof,

(1) 1 Dow. 336.

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as a matter of law, I take it not to be the duty of a learned judge under any circumstances to direct the jury as to the question of the burden of proof as to a matter of fact: that is a question for the jury, and beyond deciding the question which a judge must always decide, namely, whether there is any evidence at all to go to the jury, it seems to me on questions of fact the province of the learned judge does not entitle him to go. But in Lord Eldon's opinion he says that primâ facie the onus of proof that she is not seaworthy lies on the defendant, but where the inability of the ship to perform the voyage becomes evident within a short time after the sailing, the presumption is that it arises from causes existing before she set sail on the voyage, and that the ship was not then seaworthy. (1) Now two points arise upon the observations that were made. In the first place it is clear that when Lord Eldon speaks of the inability of the ship to perform the voyage becoming evident a short time after the sailing, and the presumption being shifted, he must mean (and it is obvious from the context that he did mean) where no other facts are given in evidence. But he cannot be held to have meant this: that where at the very same time that the short period of the voyage is proved which is relied upon to raise a presumption, and there is also a cause proved which might fairly account for the loss, even as a matter of fact, that the presumption shifts back and is thrown upon the other party. And again: the second point for observation is this—that when he speaks of the presumption shifting back he is not speaking of a presumption of law, but he is speaking of a presumption of fact.

I think that there has been in this case a misdirection such as necessitates a new trial.

Judgment affirmed.

Solicitors for plaintiff: *Hollams, Son, & Coward.*
Solicitors for defendants: *Freshfields & Williams.*

(1) 1 Dow. at p. 344.

[IN THE COURT OF APPEAL.]

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Feb. 12.

CHARLES BRADLAUGH AND ANNIE BESANT *v.* THE QUEEN.

Criminal Pleading—Indictment for publishing Obscene Libel—Omission to set out Words charged as Obscene—Arrest of Judgment—Error—Defect not cured by Verdict.

In an indictment for publishing an obscene book, it is not sufficient to describe the book by its title only, for the words thereof alleged to be obscene must be set out; and if they are omitted, the defect will not be cured by a verdict of guilty, and the indictment will be bad either upon arrest of judgment or upon error.

Judgment of the Queen's Bench Division (2 Q. B. D. 569) reversed.

4 C.P.D. 126
11 C.L.D. 509
7 Cox C.C. 372

ERROR upon a judgment of the Queen's Bench Division (1).

The record alleged that at the Central Criminal Court an indictment was presented against the plaintiffs in error, the first count of which was in the following terms:—

"Central Criminal Court, to wit: The jurors for Our Lady the Queen, upon their oath present, that Charles Bradlaugh and Annie Besant unlawfully and wickedly devising, contriving, and intending as much as in them lay to vitiate and corrupt the morals as well of youth as of divers other liege subjects of our said Lady the Queen, and to incite and encourage the said liege subjects to indecent, obscene, unnatural, and immoral practices, and bring them to a state of wickedness, lewdness, and debauchery, heretofore, to wit, on the 24th day of March, in the year of Our Lord, 1877, in the City of London, and within the jurisdiction of the said Central Criminal Court, unlawfully, wickedly, knowingly, wilfully, and designedly, did print, publish, sell, and utter a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy, and obscene book called 'Fruits of Philosophy,' thereby contaminating, vitiating, and corrupting the morals as well of youth as of other liege subjects of our said Lady the Queen, and bringing the said liege subjects to a state of wickedness, lewdness, debauchery, and immorality, in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown, and dignity."

(1) 2 Q. B. D. 569.

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The second and only other count was precisely similar, except that the date of the alleged offence was the 29th of March, 1877. The record then set forth the removal of the indictment into the Queen's Bench Division, by a writ specifying Middlesex as the county and jurisdiction in which the indictment was to be tried, the plea of not guilty by the plaintiffs in error, the joinder of issue thereon by F. Cockburn, as the Queen's coroner and attorney, and and the award of jury process. The record afterwards alleged, amongst other matters unnecessary to be mentioned, that on the 18th of June, 1877, before Cockburn, C.J., a jury was impanelled and sworn, and a verdict of guilty was found against both the plaintiffs in error. The record afterwards proceeded as follows: "And because the Court of Our Lady the Queen now here, to wit, the Queen's Bench Division of the High Court of Justice, is not as yet advised about giving their judgment of and upon the premises whereof the said Charles Bradlaugh and Annie Besant are so convicted as aforesaid, day is therefore given as well to the said F. Cockburn, Esq., who for our said Lady the Queen in this behalf prosecuteth, as to the said Charles Bradlaugh and Annie Besant, until the 28th day of June, in the 41st year of the reign of Our Lady the Queen, before our said Lady the Queen, at Westminster, that is to say, before the Queen's Bench Division of the High Court of Justice, to hear their judgment thereupon."

The record then alleged that on the 28th of June it was adjudged and ordered by the Queen's Bench Division, upon each of the counts of the indictment, that the plaintiffs in error should be severally imprisoned for six calendar months, and should severally pay a fine of 200*l*., and should severally give security for good behaviour for two years.

Error having been brought, the following were alleged as the grounds thereof:—

(I.) That the indictment shews no offence known to the law, and does not warrant the conviction and sentence.

(II.) That the libel in question was professedly a work on medical science and political economy, and that in the indictment in which the said work is alleged to be "an indecent, lewd, filthy, and obscene libel," such portions of the work as were libellous as aforesaid ought to have been set out.

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(III.) That the indictment does not shew any specific offence, and that the particular words supposed to be criminal ought to have been expressly specified and set forth in the indictment.

The Queen's coroner and attorney joined in error.

Jan. 29, 30, 31. The plaintiff in error, *Bradlaugh*, in person. The omission to set out the book in the indictment renders it bad; whenever words formed the ground of complaint in an action of law, they must have been set out in the declaration: *Zenobio* v. *Axtell* (1), *Cook* v. *Cox* (2), *Wright* v. *Clements* (3); and this rule also applies to criminal cases: Archbold's Crim. Pl. and Evid. bk. i. pt. 1. ch. 1, s. 3 (ed. 18), p. 58. In *Rex* v. *Sparling* (4), where the defendant was convicted of profane cursing and swearing under 6 & 7 Wm. 3, c. 11, the conviction was held bad because the curses and oaths were not set out, and *Rex* v. *Popplewell* (5) is to the like effect. In *Hunter's Case* (6) an indictment for forgery was held bad under the then existing law, because the words alleged to be forged were insufficiently described. In *Rex* v. *Mason* (7) it was held to be a fatal objection that the indictment did not disclose the nature of the false pretences, and this case has not been overruled by *Reg.* v. *Goldsmith* (8), in which the indictment was for unlawfully receiving goods knowing them to have been obtained by a false pretence. In a libel, the words complained of constitute the crime, and it is a rule of criminal pleading, that "whatever circumstances are necessary to constitute the crime imputed must be set out:" *Rex* v. *Horne* (9); and the jury are entitled to judge for themselves whether the interpretation put upon the words in the indictment is the meaning intended to be conveyed in the libel: *Rex* v. *Fitzharris* (10); and any variance between the meaning alleged and the meaning proved will be fatal: Russell on Crimes, vol. iii. bk. 5, ch. 3, s. 13, 5th ed. p. 219, citing *Tabart* v. *Tipper* (11), and *Rex* v. *Bear*. (12) Before the

(1) 6 T. R. 162.
(2) 3 M. & S. 110.
(3) 3 B. & Ald. 503.
(4) 1 Str. 498.
(5) 2 Str. 686.
(6) 2 Lea. C. C. 624.
(7) 2 T. R. 581.
(8) Law Rep. 2 C. C. 74.
(9) 20 How. St. Tr. 792; per De Grey, C.J., delivering the unanimous opinion of the judges in the House of Lords.
(10) 8 How. St. Tr. 356.
(11) 1 Camp. 352.
(12) 2 Salk. 417.

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Queen's Bench Division (1), for the Crown reliance was placed upon *Dr. Sacheverell's Case* (2); but that case is really a very strong authority against this prosecution, for the judges present were unanimously of opinion that by the laws of England and constant practice in all prosecutions by indictment or information for crimes and misdemeanours by writing or speaking, the particular words supposed to be criminal must be expressly specified in the indictment or information (3). This proposition is really identical with the contention of the plaintiffs in error. It is true that the House of Lords decided (4) that in a prosecution by impeachment it was unnecessary to set out the words complained of in the articles of impeachment; but then it may well be that proceedings in Parliament are governed by different rules from proceedings in courts of criminal law. In *Rex* v. *Layer* (5) the judges overruled an objection that in an indictment for high treason the words complained of must be set out; but the real explanation of that decision is that in high treason words are not the gist of the offence, but merely evidence or proof of it: Archbold's Crim. Pl. and Evid. bk. i. pt. 1, ch. 1, s. 3 (ed. 18), p. 58. In *Rex* v. *Curll* (6), which appears to be the first case where an obscene libel was punished in the temporal courts, the passages complained of were set out. The necessity of setting out the libellous matter correctly is pointed out in Folkard on Slander and Libel, ch. 42, p. 699. Before the Queen's Bench Division the counsel for the Crown relied upon *The Commonwealth* v. *Sharpless* (7), and *The Commonwealth* v. *Holmes* (8); but the rule in the American courts is that if the obscene libel is omitted it must be averred that it is too gross to be inserted in the indictment: *The Commonwealth* v. *Tarbox* (9); and no averment of that kind here occurs. Moreover, those authorities may be dismissed with the remark that they are the decisions of the tribunals of a foreign country, and that the validity of the present indictment depends upon the common law of England. A total omission of a necessary

(1) 2 Q. B. D. 571.
(2) 15 How. St. Tr. 1.
(3) 15 How. St. Tr. 466, 467.
(4) 15 How. St. Tr. 467, 473.
(5) 6 Har. St. Tr. 328, 329, 330, 331; 16 How. St. Tr. 315, 316, 317, 318.
(6) 2 Str. 788; 17 How. St. Tr. 154.
(7) 2 Ser. & Raw. (Pennsylvania), 91.
(8) 17 Massachusetts, 336.
(9) 1 Cush. (Massachusetts), 66.

averment is not cured at common law by the verdict: *Hearne* v. *Stowell* (1); and as the indictment was not intended to relate to an offence either created or regulated by statute, the prosecution cannot rely upon the latter clause of 7 Geo. 4, c. 64, s. 21. The defect is not of a merely formal nature, and therefore the objection holds good, although this is not an appeal from a decision upon demurrer or upon a motion to quash the indictment before the jury were sworn: 14 & 15 Vict. c. 100, s. 25; *Sill* v. *Reg.* (2)

Annie Besant, plaintiff in error, in person. According to the English precedents the indictment is bad for uncertainty; and the decisions in the American courts were pronounced by foreign tribunals and cannot countervail the current of authorities in England. The indictment alleges simply that the book is obscene: this is a hardship upon the plaintiffs in error, for they could not tell whether the whole of the book or only portions of it would be relied upon as obscene: if the words complained of were set out in the indictment, they would have known what charge they were called upon to meet.

Sir H. S. Giffard, S.G., for the Crown. The indictment discloses an offence at common law, and the objection is only that the facts constituting the crime are imperfectly averred: this defect is cured by the verdict. *Rex* v. *Mason* (3) can hardly be deemed to be good law after *Reg.* v. *Goldsmith* (4); but if it can be supported it is distinguishable, for the indictment charged the defendant with obtaining money by "false pretences:" now false pretences relating to future events are not indictable, and the indictment was therefore uncertain; but the publication of an obscene book is always indictable, whatever the motive of the person publishing it may be. (5) In *Heymann* v. *Reg.* (6) it was held that a defective averment in an indictment for conspiracy was cured by the verdict of guilty. In *Rex* v. *Bishop of Llandaff* (7) it was held that an omission to allege a presentation was cured by the verdict, and as is pointed out in Serjeant Williams'

(1) 12 Ad. & E. 719.

(2) 1 E. & B. 553; 22 L. J. (M.C.) 41.

(3) 2 T. R. 581.

(4) Law Rep. 2 C. C. 74.

(5) See *Reg.* v. *Hicklin*, Law Rep. 3 Q. B. 360; and *Steele* v. *Brannan*, Law Rep. 7 C. P. 261.

(6) Law Rep. 8 Q. B. 102.

(7) 2 Str. 1006.

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note to *Stennel* v. *Hogg* (1), the decision proceeded upon the ground of the common law. Upon a similar principle a declaration, which simply charged the defendant with maliciously prosecuting the plaintiff for perjury, was held good after verdict: *Pippet* v. *Hearn.* (2) The recent decision in this Court of *Reg.* v. *Aspinall* (3) strongly supports the principle laid down in *Heymann* v. *Reg.* (4) An indictment for keeping a disorderly house may be framed in general terms, and no valid reason exists why greater strictness should be required as to an indictment for an obscene libel. The defect being only formal, it is now too late to raise any objection to it: 14 & 15 Vict. c. 100, s. 25; and it may be admitted for the Crown that the indictment would be held bad upon demurrer.

[BRAMWELL, L.J. If the defect were only formal, it might have been amended by the Court; but how could the Court direct the officer to amend the indictment, and thereby make it charge that the grand jury had presented as obscene those portions of the book, which the presiding judge considered to be obscene?]

Even in high treason the words complained of need not be stated: *Rex* v. *Stayley* (5); *Rex* v. *Layer.* (6) In *Dugdale* v. *Reg.* (7), the objection was not taken that the obscene words and prints must be set out in the indictment, and this case forms strong negative evidence that the present indictment contains all that is necessary. In many offences it is not necessary that the indictment should state the offence with particularity; thus, in *Rex* v. *Gill* (8), an indictment charging the defendants with conspiring by false pretences to obtain money was held good. The defect being an imperfect averment only, the cases as to the effect of a total omission, such as *Reg* v. *Gray* (9), do not apply: the difference between an imperfect averment and a total omission is pointed out in *Reg.* v. *Aspinall.* (10)

F. Mead, for the Crown. It is unnecessary in an indictment

(1) 1 Notes to Saunders by Williams, 260, at p. 267.
(2) 5 B. & Ald. 634.
(3) 2 Q. B. D. 48.
(4) Law Rep. 8 Q. B. 102.
(5) 6 How. St. Tr. 1501.
(6) 16 How. St. Tr. 315, 316, 317, 318.
(7) 1 E. & B. 435.
(8) 2 B. & Ald. 204.
(9) L. & C. 365; 33 L. J (M.C.) 78.
(10) 2 Q. B. D. 48, at p. 58.

for an obscene libel to set out the words complained of, and no objection can be taken to their omission even upon demurrer, or by motion to quash. The authorities relied upon by the plaintiffs in error relate to defamatory libels; and the publication of a blasphemous, seditious, or defamatory libel is an offence standing upon a different footing from the publication of an obscene libel: thus, by 5 & 6 Vict. c. 38, courts of quarter sessions are forbidden to try blasphemous, seditious, or defamatory libels, but they are not prohibited from trying obscene libels. In *Dugdale* v. *Reg.* (1), decided after the passing of that statute, the indictment contained counts for obscene libels, and the prisoner was found guilty thereon at the Middlesex sessions. *Rex* v. *Curll* (2) merely established that the publication of an obscene book is indictable as an offence contra bonos mores, and punishable in the temporal courts; it was not decided that it is an offence of the same nature and subject to the same rules as a defamatory, blasphemous, or seditious libel. The offence charged upon this indictment is like that contained in the indictment in *Rex* v. *Sedley* (3), and it is not a libel in the true sense of the word: it is more like the offence of common nuisance. It is, therefore, unnecessary that the words should be set out; and although there may be no decisions in the English courts to that effect, yet the precedents in 2 Chitty's Criminal Law, ch. 3, pp. 43, 45, shew that the words may be omitted: it is true that this indictment, unlike those precedents, does not contain an averment that the matters contained in the book are too gross to be set out; but that defect is cured by the verdict; and at all events, the omission of that averment is supplied by the description of the book as "an indecent, lewd, filthy, and obscene libel." The cases in the American courts clearly support the argument for the Crown: thus, in *The Commonwealth* v. *Sharpless* (4), it was held to be unnecessary to set out an indecent picture in an indictment, and *The Commonwealth* v. *Holmes* (5), and *The People* v. *Girardin* (6), and *The Commonwealth* v. *Tarbox* (7), shew that the words of an obscene

(1) See the report in Dearsley, 64, where the indictment is set out in full.

(2) 2 Str. 788.

(3) 1 Sid. 168; 1 Keb. 620; 17 How. St. Tr. 155.

(4) 2 Serg. & Rawl. (Pennsylvania), 91.

(5) 17 Massachusetts, 336.

(6) 1 Mann. (Michigan), 90.

(7) 1 Cush. (Massachusetts) 66.

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libel may be omitted if they are so foul as to defile the records of the Court.

Plaintiff in error, *Bradlaugh*, in reply. The defect consists in an entire omission of a necessary averment. *Heymann* v. *Reg.* (1) is not in point; for the offence there charged was a conspiracy to defeat the operation of a statute; here the offence is regulated solely by the common law. In *Rex* v. *Wilkes* (2) the passages complained of in the Essay on Woman appear to have been set out in the information. *Rex* v. *Sedley* (3) stands upon a totally different footing from the present case. It is submitted that all prosecutions for libel are subject to the same rules, whether the words are defamatory, blasphemous, seditious, or obscene. The general words of the indictment would apply to any book which is in any degree obscene. (4)

Plaintiff in error, *Annie Besant*, in reply. In order to establish that the words ought to have been set out in the present indictment, it is necessary only to cite the following cases: as to a seditious libel, *Rex* v. *Paine* (5); as to a blasphemous libel, *Rex* v. *Williams* (6); and to an obscene libel, *Rex* v. *Curll.* (7)

Cur. adv. vult.

Feb. 12. BRAMWELL, L.J. This case comes before us upon a question of substantial importance, but nevertheless of a purely technical nature, and the decision which we have to pronounce is quite apart from the merits, and quite apart from the consideration

(1) Law Rep. 8 Q. B. 102.

(2) 4 Burr. 2527; 19 How. St. Tr. 1075.

(3) 1 Sid. 168; 1 Keb. 620; 17 How. St. Tr. 155.

(4) The plaintiff in error, *Bradlaugh*, also argued that the judgment in the Queen's Bench Division was erroneous on the ground that the trial having taken place on the 18th of June was held upon a day which, under the practice existing before the Judicature Acts, would have fallen in the sittings after Trinity Term, and that the continuance should have been to a day in what would have been the following Michaelmas Term, and not to the 28th of June. The Court intimated that the argument was unsustainable, the Judicature Act, 1873, s. 26, having abolished terms except for the purpose of computing time. They, however, gave no judgment upon this objection, as the decision of the main question rendered it unnecessary to consider it. See 11 Geo. 4 & 1 Wm. 4, c. 70, s. 9.

(5) 22 How. St. Tr. 357.

(6) 26 How. St. Tr. 653.

(7) 2 Str. 788; 17 How. St. Tr. 153.

whether any wrong has or has not been done to the plaintiffs in error.

The question has arisen under the following circumstances:— An indictment was preferred against the plaintiffs in error charging them with publishing an obscene libel, "to wit, a certain indecent, lewd, filthy, and obscene book called 'Fruits of Philosophy;'" upon this indictment they were found guilty. They afterwards moved the Queen's Bench Division in arrest of judgment, and the rule which they asked for was refused; and the question before us is whether the judges of that Court were right in refusing that rule, or whether they ought to have granted it. The objection taken was that the indictment stated, but did not shew, that an offence had been committed; or, as it may be put in somewhat different language, the objection was that the indictment simply averred that an offence had been committed, and did not shew how it had been committed. For the Crown it was almost admitted by the Solicitor General that if the objection had been taken by demurrer, it would have been good; but it was urged that it was cured by the verdict, on the ground that the jury could not have found the plaintiffs in error guilty, unless an obscene libel had been proved at the trial to have been published by them.

It is undoubtedly a rule that an indictment for any offence must shew that the offence has been committed, and must shew how it has been committed; and if these particulars are omitted judgment will be arrested. No doubt that is the general rule; and I do not intend to allude to alterations made by statute as to criminal pleading, because no statute is applicable to this case; therefore in the observations which I shall make as to the form of indictments, I shall speak as if the common law were unaltered. It is not enough to indict a person for that he committed murder, or murdered A. B.; at common law it must be shewn what he did; so that if the acts charged are proved to have been perpetrated, it would be shewn that he committed murder; in other words, it is not enough to allege that he committed the crime, it must be shewn how he committed it. Similarly in an indictment for burglary, it is not enough to allege that the accused committed a burglary, or to allege that he committed a burglary at the house

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of A.; it must be charged that he burglariously entered between certain hours, with other circumstances shewing how the crime was committed, and those facts must be stated which constitute the crime said to have been committed. For this rule three reasons were assigned, two of which I do not think very important, at all events, at the present time; but the third is of a more substantial character. One of these reasons was, that the person indicted for the commission of a crime might know what charge he had to meet; if he were charged with murder or burglary generally, he would not know what particular act was alleged against him, and what he had to meet. Another reason was that, if convicted or acquitted on an indictment of that kind, the accused could not plead or prove, with the same facility as otherwise he might, a plea of autrefois convict or autrefois acquit. At the present day, I think those two reasons may be disregarded, because an accused person is very rarely ignorant of the charge which he is called upon to meet, and no real difficulty exists as to pleading or proving a former conviction or acquittal. But even as to these reasons I must admit that a very plausible observation was made by the female plaintiff in error, namely that the book, as a whole, was charged as an offence against her, and she could not possibly tell what passages would be selected as those on which the charge was to be supported. The third reason, in my opinion, is to this day substantial, and cannot be disregarded. It was that a defendant is entitled to take the opinion of the Court before which he is indicted by demurrer, or by motion in arrest of judgment, or the opinion of a Court of Error by writ of error, on the sufficiency of the statements in the indictment. It is true that a defendant has the decision of the judge presiding at the trial as to the validity of the indictment, yet it is not unreasonable that he should be at liberty in some way to question the decision of that judge. But whether these three reasons were good or bad, they clearly existed with reference to the form of indictment, which accordingly, as I have already intimated, must shew not only that the accused committed the offence, but must also state the facts which constituted it.

In some instances, words are the subject-matter of an indictment; and it follows from this principle, which I have mentioned,

that wherever the offence consists of words written or spoken, those words must be stated in the indictment; if they are not, it will be defective upon demurrer, in arrest of judgment or upon writ of error. For instance, upon an indictment for perjury, it was necessary that the facts constituting the perjury should be set forth, and that necessity existed until 23 Geo. 2, c. 11. The authorities will be found in 2 Chitty's Crim. Law, ch. 9, p. 307, 2nd ed. That statute recited the extreme difficulty of getting convictions for perjury by reason of difficulties attending the prosecutions for them, and effected an alteration whereby the offence was allowed to be stated in a more general way. In like manner, upon an indictment for forgery it was necessary to set out the words of the forged instrument, as appears from 3 Chitty's Crim. Law, ch. 15, p. 1040, 2nd ed. In like manner, there can be no doubt that in an indictment for defamatory libel it was necessary to set out the words complained of, so that the Court might judge whether they were or could amount to a libel. Now, in support of this doctrine, I will refer to *Cook* v. *Cox*. (1) The action was for slander, and after a general verdict for the plaintiff a motion was made in arrest of judgment, on an objection to the last count, which did not set out the words complained of. Lord Ellenborough, C.J., in delivering the judgment of the Court, said (2): "The objection is, that in a count for slander by words the words themselves should be set out, in order that the defendant may know the certainty of the charge, and may be able to shape his defence, either on the general issue, or by plea of justification accordingly, and that this defect is not cured by verdict." Now, that is what his Lordship states to be the objection. Then he says (3): "The allegation then amounts to this; that the defendant by words, or by words coupled with acts, slandered the plaintiff in his trade, and therefore it is bad, and not cured by verdict, as a charge in the alternative. But supposing it to be taken as a charge of oral slander only, the weight of authorities is against the setting out words by their effect only. This count is equivalent to an allegation that the defendant used certain words to the effect of imputing insolvency to the plaintiff." Lord Ellenborough then goes on to

(1) 3 M. & S. 110. (2) Page 113.

(3) Page 114.

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cite the authorities, beginning with *Newton* v. *Stubbs* (1), which he says, "is an express authority that a count for using words to the effect following, &c., is bad after verdict," and he cites a variety of other cases, amongst them, *Dr. Sacheverell's Case* (2), and he says (3): "There seems to be no reason for any difference in this respect between civil and criminal cases; the action arises ex delicto." And, most certainly, if there was a difference, it would be that less strictness is required in civil than in criminal cases. Then he proceeds, after mentioning another case: "Unless the very words are set out, by which the charge is conveyed, it is almost, if not entirely, impossible to plead a recovery in one action in bar of a subsequent action for the same cause. Identity may be predicated with certainty of words, but not of the effect of them as produced upon the mind of a hearer. It has been said that this is not like the case of a defective title, but is more analogous to that of a title defectively set out. If, however, the authorities cited are law, and they are supported by more ancient ones, it is of the substance of a charge for slander by words that the words themselves should be set out with sufficient innuendoes, and a sufficient explanation, if required, to make them intelligible; it is of the substance of a charge of slander of any sort that it should not be laid in the alternative. Upon the whole, we think that this count is so defective in substance, that no intendment can be made to supply its defects from what can be presumed to have passed at the trial; and consequently that the judgment must be arrested." Now, that was the opinion of the Court of King's Bench, in an action for slander. I may mention that that case is referred to and recognised in *Solomon* v. *Lawson* (4), in which it was held that where a declaration for a libel set out a publication which referred to a previous publication, but, unless by reference to the language of the previous publication, contained no libel, such previous publication must be considered as incorporated in the publication complained of, and must appear in the declaration to be set out verbatim, and not merely in substance. It is true that these two cases relate to actions at law, and the first is an action

(1) 2 Show. 435.
(2) 5 Har. St. Tr. 828; S. C. 15 How. St. Tr. 466, 467.
(3) Page 116.
(4) 8 Q. B. 823, at p. 839.

for slander. But, as was said by Mr. Justice Blackburn, in *Heymann* v. *Reg.* (1), at common law there is no difference between civil and criminal pleading except that, as I have before intimated, according to the spirit in which our law is administered, if there were a difference, more strictness would be required in criminal than in civil pleading. On these authorities it is manifest that where words constitute the offence, they must be stated in the indictment; and the authorities distinctly shew that where a defamatory libel is complained of, as was almost admitted by the Solicitor General, it must be stated in the indictment. It seems to me that whatever reason there is for setting out the words of a defamatory libel, is equally applicable to other writings that are called libels; though possibly, as Mr. Mead argued, they are called libels in a different sense from that in which defamatory writing is called a libel. Lord Justice Brett has collected authorities upon the matter. I do not know that there is any case in which judgment has been arrested on an indictment or information for a seditious, a blasphemous, or an obscene libel for want of setting out the words. But no precedent can be found in which they have not been set out, except in certain American cases, to which I shall presently refer; and except in two precedents in 2 Chitty's Crim. Law, pp. 43, 45, with which also I will deal, when I come to the American cases; and then there has been no judgment in an English Court of justice that they need not be set out, and no decision that the indictment will not be bad in arrest of judgment; and I repeat that whatever reason can be given for setting out the very words in defamatory libels, is equally true in blasphemous, obscene, or seditious libels. First, I will cite *Rex* v. *Curll* (2), where it was held that an obscene book is punishable as a libel in the temporal courts, and I will mention *Rex* v. *Sparling* (3), in which it was held that a conviction for cursing and swearing was bad, because it did not set out the words which had been used.

That being the general principle, we must deal with the argument that obscene libels need not be, and indeed ought not to be, set forth on the record; the reason given being that the records of the court should not be defiled by any indecency of that kind.

(1) Law Rep. 8 Q. B. 102, at p. 105.

(2) 2 Str. 788.

(3) 1 Str. 497.

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Speaking with the greatest respect to those who have thought otherwise, I think the objection fanciful and imaginary. The records of a court of justice are not read with a view to entertainment or amusement; and if the objection has any weight, why does it not apply to other libels, and to other offences? I suppose the majority of mankind would think much worse of a blasphemous libel than even of an obscene libel, and would consider it much more objectionable that the terms of the former should be perpetuated than those of the latter. I suppose excellent reasons could be given why seditious language, possibly alluding disrespectfully to the Sovereign, should not be perpetuated on the court rolls. But there is another kind of libels, which, to my mind, if it were possible, ought to be effaced from the rolls, and yet it is admitted that they must be set out on the record—I mean libels defaming the character of a private person. Let us see which is the worst in its consequences. Suppose a man indicted for a libel charging an infamous crime against another. It must be set out upon the record, for it is a defamatory libel. Then the defendant may never plead, or may not be arrested, or he may die, and thus the charge may never be tried, and yet that statement is to remain on the record for all time, and no answer will be given to it. In some respects it would be well that such an imputation as that should be effaced from the records of the court—an imputation so grievous to the individual and all connected with him. However, the argument as to this point on the part of the Crown was supported by authority. The only semblance of authority in English law was the precedents which I have mentioned. We are in the habit of looking at precedents as containing the law; but that is when there is a series of them, so that we may be sure that they would not be in existence or perpetuated unless they had received the sanction of the courts; these are in truth but one precedent, and therefore I do not think I need pay much attention to them. In support of this contention for the Crown, some American cases were cited. Decisions in the Courts of the United States are not binding authorities; and although they may be expressly in point, yet if they are contrary to our law, they must be disregarded. Whatever respect we may be disposed to pay to the judge who pronounced the decision, the only manner in which an

American case can be used as a guide is to consider it as the expression of the opinion of an able person acquainted with the general spirit of our law; and therefore we may look at it in much the same way, as we may consider the decisions of the judges of French, Italian, or other courts who have pronounced opinions upon mercantile law, which to a certain extent is common to ourselves. But I do not think that the American cases cited before us assist the case for the prosecution. It seems to have been assumed in the Queen's Bench Division that *The Commonwealth* v. *Holmes* (1) shewed that generally an obscene libel need not be set forth in terms; but the plaintiff in error, Bradlaugh, has produced before us *The Commonwealth* v. *Tarbox* (2), which was not cited in the Court below. In that case the indictment was held to be good without setting forth the obscene words, because there was an allegation that the libel was so obscene that it could not be, with decency and propriety, put upon the record. The rule in the American courts appears to be that when there is no allegation excusing the statement of the words on the record, on the ground of what may be called their infamy, they must be set out. In *The People* v. *Girardin* (3) a vigorous and forcible judgment was pronounced in favour of the view now put forward on behalf of the Crown; but even in that case some description of the nature of the obscenity complained of was inserted in the indictment. Here the indictment does not allege that the words are too obscene to be inserted; and therefore in any point of view the American cases assist the argument for the plaintiffs in error. It was suggested that the insertion of the words complained of is sufficiently excused, because it is averred that the plaintiffs in error published "a certain indecent, lewd, filthy, and obscene libel." That was very well met with this argument: Would not those words be the proper prefatory description of every obscene libel? and that in order to bring this indictment within the authority of the American cases it would have been necessary to aver that the libel was so utterly indecent, filthy, lewd, and obscene that it ought not to appear on the records of the court. For the prosecution reliance was placed also on *Dugdale* v. *The*

(1) 17 Massachusetts, 336. (2) 1 Cush. (Massachusetts), 66.
(3) 1 Mann. (Michigan), 90.

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Queen (1), but the decision in that case does not affect the rule of law laid down in previous authorities.

We are not asked to say that the law is altered, because no power can alter it but the legislature; and it is not pretended that the legislature has altered it. What in effect we are called upon to do is, to say that the law has been mistaken and misunderstood, and that it is not necessary to set forth words when they constitute a crime. Reliance has been placed upon certain cases as to the law relating to false pretences, in which it has been held that after verdict judgment could be arrested, although the false pretence had not been stated. Now I do not think it necessary to go critically into those cases. I do not suggest for a moment that they were not rightly decided, but I wish to make this observation about them, namely, that they are cases in which the courts have held, rightly or wrongly, that the defect was not a failure to state the ingredients of the offence, but they were cases in which those ingredients had been imperfectly stated. This distinction is explained in the judgment of Blackburn, J., in *Heymann* v. *The Queen* (2), where he says: "The objection to the count therefore is that it does not state that the agreement or confederacy was in contemplation or expectation of an adjudication; and if the question had arisen upon demurrer, I am not quite prepared to say that that might not have been a good objection. But it is a general rule of pleading at common law—and I think it necessary to say where there is a question of pleading at common law there is no distinction between the pleadings in civil cases and criminal cases—where an averment, which is necessary for the support of the pleading, is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the Court after verdict that the verdict could not have been found on this issue without proof of this averment, there, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict." That rule was held to apply in *Reg.* v. *Goldsmith.* (3) The prisoner was indicted for receiving goods, knowing them to have been obtained by means of false and fraudulent pretences, which were not set out; she was convicted, and the Court

(1) 1 E. & B. 435; 22 L. J. (M.C.) 50; Dears. 64.

(2) Law Rep. 8 Q. B. 102, at p. 105.

(3) Law Rep. 2 C. C. 74.

for Crown Cases Reserved held the conviction must be affirmed. I concurred in thinking that the judgment ought not to be arrested, and my reason for so thinking was, that it was impossible that if the false pretence used by the principal offender had been proved at the trial to be a future promise, or a matter of opinion, the judge would have let that case go to the jury. A false pretence primâ facie imports not a promise, but a misrepresentation as to something existing. These are the only observations which I shall make about this case; but whether it was rightly or wrongly decided, it is impossible that the judges who decided that case could have intended to lay down a different law from that, which had been established by previous authorities. It is the duty of judges to administer the law as they find it, and to leave the legislature to amend whatever defects there may be. Therefore, even if this case may appear to be difficult to reconcile in principle with previous cases, it does not overrule the current of authorities, which shew that the offence, and the facts constituting the offence, must be stated; that where those facts consist in words, the words must be set forth; and that if they be not, the indictment is bad, either on demurrer, or in arrest of judgment, or upon a writ of error.

Before concluding I ought to consider the reasons given by the judges of the Queen's Bench Division for the opinion they expressed, and I need scarcely say that I entertain the greatest respect for their decision. I think the Lord Chief Justice gives three reasons. First, he thinks it would be inconvenient to set out in an indictment the whole of a book alleged to be obscene, if in its entirety it is made the subject of a prosecution, and he alludes to the inconvenience of setting out in extenso the whole of a publication which may consist of two or three volumes. (1) With great submission to the Lord Chief Justice, I think it very unlikely that a work contained in many volumes will ever be published, the obscenity of which cannot be made apparent without the whole being set out in the indictment. But if the question of convenience were to determine whether the libel is to be set out, it would be necessary to adopt some rule, and that rule would probably be that the words of a libel need not be set out when it is very long. But then it would be very difficult to

(1) 2 Q. B. D. 572, 573.

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determine what length would render it unnecessary to set out the libel; would two volumes be too many, would one volume, 100 pages, or what other amount? It may be a great inconvenience that a long libel should be put upon the record; but whatever the inconvenience may be, it seems to me that upon an indictment for private defamation, blasphemy, obscenity, or sedition, where the objection is to the whole, and not to a part, the whole must be set out.

The next reason assigned by the Lord Chief Justice was that the objection ought to have been taken by demurrer. (1). It might be more convenient for the administration of justice to enact that if a man will not take an objection to an indictment by demurrer, he shall not be at liberty to take it by motion in arrest of judgment, or by error. I think that many reasons can be urged in favour of limiting the power to take advantage of technical defects, but that is a matter to be considered by the legislature, and the answer which I have to give to the second reason assigned by the Lord Chief Justice is that the law of the land, as it at present stands, allows technical objections to an indictment to be taken upon arrest of judgment or by writ of error.

Then the Lord Chief Justice proceeds to mention the third objection, namely (2), that "although the subject-matter of this indictment falls within the law of libel, it to a certain extent arises out of the general law as being commune nocumentum, a matter complaint as to which arises from its being subversive of public morals, and therefore a public nuisance." It may be admitted that an offence of the kind alleged in the indictment before us is commune nocumentum, and that it may still be so described; but the answer to the third reason assigned by the Lord Chief Justice is, that whether the offence is commune nocumentum or not, the plaintiffs in error are charged with having committed it, and therefore the law requires that it should be fully stated in the indictment. I find no exception to the general rule, that where the offence is alleged to be commune nocumentum, the ingredients of it, the facts which constitute it, need not be stated in the indictment. I cannot feel the force of the difficulties propounded by the Lord Chief Justice.

Then my Brother Mellor bases his decision upon the ground

(1) 2 Q. B. D. 573, 574. (2) 2 Q. B. D. 574.

that an objection of this kind could be taken by demurrer to the indictment, and says that the point may still be taken upon error. (1) The Lord Chief Justice also says (1): "We shall, however, shelter ourselves under the decisions of the American courts, leaving the ultimate decision of this matter—an important one, no doubt—to the Court of Error." I am glad to find those two statements of opinion, because when one has the misfortune to differ from the views of learned judges, it is a very great comfort to know that those views were not entertained strongly. I cannot help thinking that the opinions expressed by the Lord Chief Justice and my Brother Mellor shew that they thought that this was a matter which was fairly open to argument, and which might be reviewed in the Court of Error. It results, therefore, to my mind, that the authorities to which I have referred are unimpeached and are binding upon us, and no sufficient reason has been given why we should not act upon them.

Now this indictment is not merely doubtful, but wholly defective; not only are the words not set forth, but no description of any kind is given. The offence alleged is that the plaintiffs in error "did print, publish, sell, and utter a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, bawdy, and obscene book called the 'Fruits of Philosophy.'" The words following "to wit" serve only as a mere identification of the alleged libel, and therefore the indictment may be read as though it had merely charged that the plaintiffs in error had uttered a certain indecent, lewd, filthy, bawdy, and obscene libel. Under these circumstances certainly I am of opinion that the judgment ought to have been arrested, and we ought now to pronounce judgment to that effect, and reverse the judgment of the Queen's Bench Division. I repeat that I wish it to be understood that we express no opinion whether this is a filthy and obscene, or an innocent book. We have not the materials before us for coming to a decision upon that point. We are deciding a dry point of law, which has nothing to do with the actual merits of the case.

BRETT, L.J. It seems to me that we are not called upon to differ from any strongly formed opinion of the Lord Chief Justice

(1) 2 Q. B. D. 574.

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and Mr. Justice Mellor; I think that their judgments shew that they did not form a strong opinion as to the point which we shall have to determine in this case. Some of the authorities which we have had to consider were not brought before the Queen's Bench Division; and with regard to the argument for the Crown there, it must be observed that, except *Reg.* v. *Dugdale* (1), the only decisions cited as to indictments were American cases, and I think it will appear that *Reg.* v. *Dugdale* (1) is not in point for the present proceedings. It is evident from the terms of his judgment that Mr. Justice Mellor came to the conclusion that the words complained of ought to be set out, and that their omission would have made this indictment bad on demurrer; and one ground of the judgment of the Lord Chief Justice was likewise that the objection ought to have been taken by demurrer. The only real point, therefore, upon which we differ from the learned judges, is, that the omission in this case was so great a defect that it is not cured by the verdict.

It seems to me that the questions raised in this case are, first, what is it necessary to set out in such an indictment as this; secondly, what kind of omissions can or cannot be cured by verdict; and thirdly, whether in this indictment the omission was so great a defect that it could not be cured by the verdict.

The first question really comes to this, whether in an indictment of this kind it is necessary to set out the words relied upon as constituting the offence. I cannot express what I believe to be the rule with regard to indictments more accurately in my view than was done in *Reg.* v. *Aspinall.* (2) In that case almost every sentence of the judgment delivered by me on behalf of Lord Justice Mellish and myself was, I may venture to say, the result of many cases; as to each sentence a laborious examination of cases was made, and it was intended to express what we considered to be the result of those cases, and I cannot find better words now in which to express the result. With regard to indictments, it is there said (3) that "every pleading, civil or criminal, must contain allegations of the existence of all the facts necessary to support the charge or defence set up by such pleading. An indictment

(1) 1 E. & B. 435; 22 L. J. (M.C.) 50; Dears. 64

(2) 2 Q. B. D. 48.

(3) 2 Q. B. D. at p. 56.

must, therefore, contain allegations of every fact necessary to constitute the criminal charge preferred by it. As in order to make acts criminal, they must always be done with a criminal mind, the existence of that criminality of mind must always be alleged. If, in order to support the charge, it is necessary to shew that certain acts have been committed, it is necessary to allege that those acts were in fact committed. If it is necessary to shew that those acts, when they were committed, were done with a particular intent, it is necessary to aver that intention. If it is necessary, in order to support the charge, that the existence of a certain fact should be negatived, that negative must be alleged." Where the crime alleged in an indictment consists of words written or spoken, it seems to me that the words are the facts which constitute the crime, and that for this reason the words must be set out.

Now, the word "libel," as popularly used, seems to mean only defamatory words; but words written, if obscene, blasphemous, or seditious, are technically called libels, and the publication of them is by the law of England an indictable offence. The publication of obscene words comes also under another class of offences, namely, the class of offences against morality. I am aware that in a valuable book lately published, Stephen's Digest of the Criminal Law, ch. xviii. art. 172, p. 104, obscene words written are not put under the class of libels, but they are put under the class of offences against morality But they have long been treated as falling within the legal meaning of the term "libel." Therefore libels may be divided into seditious, blasphemous, obscene, and defamatory. There are other offences which consist in words, either written or spoken, such as perjury, false pretences, forgery, letters demanding money with threats, and the administration of unlawful oaths, and I think it will be found that indictments for committing any of these offences are all within the principle which I have stated, namely, that inasmuch as the crime consists in the words, the words must be stated; and I think I shall shew that in every one of those cases there is authority for saying that the words must be set out, unless the necessity for setting out the words is excused by statute; and it seems to me that each of the statutes which have been passed to excuse the necessity of setting out the words, is

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an authority that without the statute, by the common law, the words must have been set out, and of course wherever it has been decided that the omission to set out the words is a fatal objection, even after verdict, the decision shews still more strongly than the statutes which I have mentioned, the necessity for setting out the words, and that the objection must be fatal on demurrer. As we have to deal with a decision of such high authority as that of the Queen's Bench Division I have thought it right to look carefully into the authorities, and those authorities I feel bound to cite, in order to justify the conclusion at which I have arrived.

One of the earliest cases relates to the offence of cursing and swearing and uttering of profane oaths, which of course consists in words: it is *Rex* v. *Sparling*. (1) This conviction was for profane cursing and swearing under 6 & 7 Wm. 3, c. 11, and it set forth that the defendant did "profanely swear 54 oaths, and did profanely curse 160 curses," but none of them were set out. There having been a conviction there must have been a trial, and a decision of the court of petty sessions, but it was held that the conviction was nought, because the oaths and curses were not set forth. The Court of King's Bench, including Lord Holt, gave as a reason—"For what is a profane oath or curse is a matter of law, and ought not to be left to the judgment of the witness; he may think false evidence is so; suppose it was for seditious or blasphemous words, must not the words themselves be set out, be they ever so bad, that the Court may judge whether they are seditious or blasphemous." *Rex* v. *Popplewell* (2), and *Rex* v. *Chaveney* (3) are cases of a similar kind, and relate to the same subject-matter. They are all after conviction, and they seem to me to be authorities for saying that whenever words are complained of they must be set out, and that the omission of the words is fatal after verdict or decision.

I will now refer to the law as to letters demanding money. In *Lloyd's Case* (4), an indictment, following the words of the Black Act, 9 Geo. 1, c. 22, charged the prisoner with feloniously sending a letter, without any name subscribed and signed thereto, demanding

(1) 1 Str. 497.
(2) 2 Str. 686.
(3) 2 Ld. Raym. 1368.
(4) 2 East's Pleas of the Crown, ch. 23, par. 5, p. 1122.

money. After conviction it was moved in arrest of judgment that the indictment was bad on two grounds, one of which was that neither the letter nor even the substance of it was set forth in the indictment. It was held bad in arrest of judgment, and the reason was that in every indictment a complete offence must be shewn, and the report states that the precedents which had been looked through generally set forth the letter.

With regard to false pretences, it is only necessary to refer to *Rex* v. *Mason*. (1) That case is always quoted. I know it was said by Mr. Justice Mellor, in *Heymann* v. *Reg.* (2), that it had been virtually overruled, and in *Reg.* v. *Goldsmith* (3), Lord Justice Bramwell expressed his concurrence with the remark of Mr. Justice Mellor. But I have failed to find any case before *Heymann* v. *Reg.* (4), which treats *Rex* v. *Mason* (1) as overruled; on the contrary it has been again and again approved of and cited as a binding authority. The indictment was that the defendant had obtained from "one Robert Scofield divers sums of money, that is to say, the sum of two guineas, of the value of two pounds and two shillings of lawful money of Great Britain, of the proper moneys of the said Robert Scofield, by false pretences, with an intent then and there to cheat and defraud the said Robert Scofield of the same." The defendant pleaded not guilty, and on his trial at the quarter sessions at Worcester he was convicted, and sentenced to transportation; but the judgment was reversed by the Court of King's Bench upon a writ of error. The first objection was that the offence imputed was not specified with sufficient particularity. "Several objections," said Mr. Justice Buller (at p. 586), "have been made on the part of the defendant, but the material one on which I found my judgment is, that the indictment does not state what the false pretences were. . . . I am of opinion the first objection is fatal, and that the judgment must be reversed:" and Mr. Justice Grose says he is of opinion, "that the objection that the pretences are not specified is decisive, and for the reasons mentioned by the defendants' counsel; that the defendant may know what he is to defend, and the Court may see what punishment they are to inflict." I think that those are reasons why the words should be

(1) 2 T. R. 581.
(2) Law Rep. 8 Q. B. 102, at p. 103.
(3) Law Rep. 2 C. C. 74, at p. 79.
(4) Law Rep. 8 Q. B. 102.

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set out, but to my mind the fundamental reason is, that the words are the ground of complaint. *Rex* v. *Perrott* (1) is to the same effect. It was an indictment for obtaining money by false pretences, and the judgment was arrested for the reason that, although the false pretences were set out, there was not an averment stating that they were false; but Lord Ellenborough says (p. 385): "Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him. The legislature have so held, and have recorded their opinion to that effect in the cases of perjury." And then he mentions the statute as to perjury, 23 Geo. 2, c. 11, which allows the substance of the charge to be set forth. He also cites *Rex* v. *Mason* (2), and approves of it.

The cases with regard to perjury I do not propose to cite, because 23 Geo. 2, c. 11 (3) is a strong authority pronounced by the legislature itself, that by the common law, upon an indictment for perjury, the words must be set out.

As to the law of forgery I will mention *Hunter's Case.* (4) The prisoner was charged with the forgery of a navy bill, and the objection taken was that, although the indictment alleged the forgery of a receipt for money, there was not a sufficient averment to shew how the fabricated words amounted to a receipt. I quote the case for the opinion of the judges, delivered by Grose, J. (5), "The material objection to this indictment was, that it did not contain any averment amounting to a capital offence, for although it avers that the prisoner forged a certain receipt for money, yet there is nothing stated in any of the counts to shew that the instrument set out, which does not on the face of it import to be a receipt, is in fact a receipt." *Rex* v. *Mason* (2) is then cited, and the learned judge afterwards adds, "In indictments for forging a bill, bond, note, will, or other instrument, an exact copy of the instrument respectively charged to have been forged must be stated." (6)

Now the next head which I will mention is the administering

(1) 2 M. & S. 379.

(2) 2 T. R. 581.

(3) Repealed by 30 & 31 Vict. c. 59, having been practically superseded by 14 & 15 Vict. c. 100, s. 20.

(4) 2 Leach, C. C. 624.

(5) Page 631.

(6) See as to the now existing law, 14 & 15 Vict. c. 100, ss. 5, 6, 7, and 24 & 25 Vict. c. 98, ss. 42, 43,

unlawful oaths. This offence clearly consists in using the forbidden words. There are two statutes with regard to it, the 37 Geo. 3, c. 123, which in s. 4 excuses the setting out of the words, and provides that it shall be sufficient to set out only the substance and effect, and the 52 Geo. 3, c. 104, which in s. 5 contains a similar provision. The legislature excuses the setting out of the words, and, therefore, as it seems to me, admits that the words must have been set out if it had not been for the provisions in these statutes.

The next case which I shall cite is a decision with regard to a seditious libel, and it is *Rex* v. *Horne*. (1) There the words relied upon were set out, and the information was held good. It was in many respects a remarkable case.

I will now go to cases as to defamatory words, and the first which I will cite is *Newton* v. *Stubbs*. (2) It was an action for words spoken of the plaintiff, and it was alleged that on one occasion the defendant spoke the words "ad effectum sequentem." It was objected that this was uncertain, and the Court held that this mode of pleading was wrong.

I will next refer to *Zenobio* v. *Axtell* (3), which was cited in the course of the argument. It was an action for publishing a defamatory libel in the French language, in a newspaper called the *Courrier de Londres*. The declaration alleged that the libel was "according to the purport and effect following in the English language," and then it set out the translation. It stated that what had been said was in the French language, and then assumed to state its purport and effect in English, and it did not say, "which being translated into English has the following meaning." Upon that ground Lord Kenyon, C.J., said: "That this objection must prevail, is evident from the uniform current of precedents, in all of which the original is set forth. The plaintiff should have set out the original words, and then have translated them."

Now in *Wright* v. *Clements* (4) the declaration stated that the defendants did publish a certain libel, "containing amongst other things, certain false, scandalous, malicious, defamatory, and libellous matters, of and concerning the plaintiff, in substance as follows,

(1) 2 Cowp. 672.
(2) 2 Show. 435.
(3) 6 T. R. 162.
(4) 3 B. & Ald. 503.

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that is to say," and then it set out the words with innuendoes. The words were introduced by the allegation "in substance as follows." There was a motion in arrest of judgment, and it was argued, that although the words were not set out according to their tenor, yet, inasmuch as they were alleged to be set out according to their substance, it was sufficient after verdict. Lord Tenterden said, p. 506, "Judgment must be arrested. In actions for libel, the law requires the very words of the libel to be set out in the declaration, in order that the Court may judge whether they constitute a ground of action; and unless a plaintiff professes so to set them out, he does not comply with the rules of pleading. The ordinary mode of doing this is to state that the defendant published of and concerning the plaintiff the libellous matters to the tenor and effect following."

Then Holroyd, J., says, p. 508, "Now where a charge either civil or criminal is brought against a defendant arising out of the publication of a written instrument, as is the case in forgery or libel, the invariable rule is, that the instrument itself must be set out in the declaration or indictment, and the reason of that is that the defendant may have an opportunity, if he pleases, of admitting all the facts charged and of having the judgment of the Court, whether the facts stated amounted to a cause of action, or a crime."

Lord Justice Bramwell has cited the case of *Cook* v. *Cox* (1), and that case lays down the same principle. Now, these decisions were pronounced in 1814 and 1820, after Fox's Act, 32 Geo. 3, c. 60, passed in 1792. Therefore any argument based upon Fox's Act cannot prevail. It is true that before that statute the judges held that upon the trial of an indictment or information for libel, all that the jury had to find was, whether the defendant had published the writing, and whether the innuendoes were true, and that it was for the Court to say whether the writing was a libel or not. Fox's Act declared that view of the law to be wrong. Whether the legislature were right in principle, or whether the judges were right, is not for us to discuss; and we must accept the declaration of the legislature as an authoritative statement of the law. But it seems to me that Fox's Act leaves untouched the validity of an objection to the omission of words from an indict-

(1) 3 M. & S. 110.

ment or information when they form the substance of the offence charged. In principle the only difference made by that statute is, that if the written instrument can be a libel, then it is for the jury to say whether it is a libel (1); but there remains a preliminary question which it is for the Court or judge to decide, namely, whether the writing can be a libel, whether in truth there is any evidence upon which a jury can say it is a libel, and that question is still open, and is a question for the Court (2); and therefore the reason which is given by Holroyd, J., in *Wright* v. *Clements* (3) still prevails, that the words ought to be set out, in order that the defendants may demur and may raise the objection that the words cannot by any reasonable construction amount to a libel. Moreover, by the 4th section of Fox's Act, 32 Geo. 3, c. 60, the power to move in arrest of judgment is expressly preserved for the benefit of a defendant who is found guilty, and I think that the legislature intended to allow a defendant, either before verdict by demurrer, or after verdict by motion in arrest of judgment, to object that the words complained of either do not amount to a libel or are wholly omitted from the information or indictment, as the circumstances of the case may allow.

Now I come to what seems to me to be a remarkable case. It is not a decision of a Court upon the present question, but it seems to me to be a great authority; I mean *Rex* v. *Wilkes* (4). In that case an information was exhibited in the Court of King's Bench for the publication of an obscene and impious libel. That obscene and impious libel was in the book styled an 'Essay on Woman.' The facts now material are (p. 2528) that Mr. Wilkes having pleaded not guilty, and the records having been made up and sealed, "the counsel for the Crown thought it expedient to amend them by striking out the word 'purport' and in its place inserting the word 'tenor.' The proposed amendments were in all those parts of the information where the charge was that the libel printed and published by Mr. Wilkes contained matters 'to the purport and effect following, to wit:' which the counsel for the Crown thought it advisable to alter into words importing that such libel contained matters 'to the tenor and effect following, to

(1) See *Fray* v. *Fray*, 34 L. J. (C.P.) 45.
(2) See *Mulligan* v. *Cole*, Law Rep. 10 Q. B. 549.
(3) 3 B. & Ald. 503, at p. 509.
(4) 4 Burr. 2527.

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wit.'" It is clear that the words were set out; yet, because they were introduced by the words "to the purport and effect following" instead of "to the tenor and effect following," the Attorney-General, Sir Fletcher Norton, considered it unsafe to go on even after plea pleaded and issue joined, and thought it advisable to amend the record. That seems to me a very important authority.

The second question which I have proposed is what kind of omissions can or cannot be cured by verdict, and all the cases which I have cited seem to me to form a strong current of authorities to shew that in every kind of crime which consists in words, if the words complained of are not set out in the indictment or information, the objection is fatal in arrest of judgment.

Now we come to the cases which are said to be to the contrary, and I will deal very shortly with them. The first is a case upon which the Crown has relied: *Dugdale* v. *Reg.* (1) The only counts of the indictment in that case material to be now mentioned are the first and second; the first count charged the defendant with obtaining and procuring obscene prints, with intent to publish them, and the second count charged him with preserving and keeping them with the like intent. The second was held not to disclose an offence for another reason, that is, that the mere having them in his possession was not indictable. The first count was held to be good, because it alleged a step towards committing a misdemeanour. In my opinion, if a man, knowing prints to be obscene, procures them for the purpose of publishing them, his offence is complete, although he has never looked at them, and therefore the actual nature of the prints was not a part of the charge, and it was unnecessary to describe them. But further, I would strike out of the category of the cases which we are considering all cases with regard to obscene prints and obscene pictures. The publication of obscene prints and obscene pictures may be in one sense libellous, but they are not words, and therefore they do not seem to me to fall within the rules as to criminal pleadings which we are considering here to-day; the publication of them is an offence like that committed by Sir Charles Sedley (2), who was convicted, not of libel, but of indecent exposure.

(1) 1 E. & B. 435; Dears. 64.

(2) 17 How. St. Tr. 155.

Now I come to *Reg.* v. *Goldsmith* (1): I see but little difficulty in dealing with that case, if it were not for the expressions used by some of the judges. The prisoner was indicted, not for obtaining money by false pretences, but for unlawfully receiving goods knowing them to have been obtained by false pretences. The objection was that the false pretences were not set out. It seems to me that the crime charged in that case is complete, although the prisoner does not know what the false pretences were, and in this view the words actually used in making the false pretences formed no material part of the charge. If a man receives goods, being told and believing that they have been obtained by false pretences, he is just as guilty of the crime, as if he knew what the false pretences were; upon a similar principle if a man receives goods, knowing them to be stolen, he may not know from whom they were stolen, where they were stolen, or when they were stolen; but all that is wanted, in order to constitute the offence, is that he should know the fact that they have been stolen. In *Reg.* v. *Goldsmith* (1) it was sufficient to allege and to prove that the prisoner knew that the goods had been obtained by false pretences. It seems, therefore, to me that it was not necessary for the decision of that case to rely upon Serjeant Williams' note to *Stennel* v. *Hogg* (2), where it is laid down that a defect, imperfection, or omission in pleading is cured by the verdict by the common law.

Now comes the case of *Heymann* v. *Reg.* (3) That was a case of conspiracy to defraud, and in order to constitute that crime it is only necessary to shew that persons have agreed together to defraud; and as was pointed out in *Heymann* v. *Reg.* (4), and also *Reg.* v. *Aspinall* (5), the crime of conspiracy is complete so soon as the agreement to commit the unlawful act is come to; and the conspiracy may be complete, although the guilty parties have not yet agreed upon what means they should use; in a case like *Reg.* v. *Aspinall* (6), where the agreement was to defraud such persons, as might buy shares, by false pretences with regard to those shares, the conspiracy is complete the moment the parties

(1) Law Rep. 2 C. C. 74.
(2) 1 Notes to Saund. by Williams, at p. 261.
(3) Law Rep. 8 Q. B. 102.
(4) Law Rep. 8 Q. B. 102, at p. 105.
(5) 2 Q. B. D. 48, at p. 58.
(6) 2 Q. B. D. 48.

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thereto agree to deceive such purchasers, although they have not as yet agreed on the false pretences. The crime of conspiracy does not consist in words, but in the agreement; and it follows that the crime is complete, although the false pretences never were used, and although the false pretences might never have been agreed upon. In the case of *Reg.* v. *Aspinall* (1), amongst the objections put forward it was urged that the false pretences were not set out; this objection was overruled upon the authority of the decided cases (2), but there were other matters which were not perfectly stated, and the imperfection in the statement of the indictment was much relied on, and it was necessary for this Court to consider whether the defect was capable of being cured by verdict. The rule as to what can be cured is pointed out in *Reg.* v. *Aspinall* (3): "It (the rule) is thus stated in *Heymann* v. *Reg.* (4): 'Where an averment which is necessary for the support of the pleadings is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the Court after verdict that the verdict could not have been found on this issue without proof of this averment, then, after verdict, the defective averment which might have been bad on demurrer is cured by the verdict.' Upon this it should be observed that the averment spoken of is 'an averment imperfectly stated,' i.e. an averment which is stated, but which is imperfectly stated. The rule is not applicable to the case of the total omission of an essential averment. If there be such a total omission, the verdict is no cure. And when it is said that the verdict could not have been found without proof of the averment, the meaning is, the verdict could not have been found without finding this imperfect averment to have been proved in a sense adverse to the accused." And it seems to me obvious that must be the rule, upon referring to Serjeant Williams' note to *Stennel* v. *Hogg* (5), where it is said that the defect is cured by the verdict, if the issue joined be such as necessarily required on the trial proof of the facts "defectively stated." What are the issues in a criminal case? The plea of not guilty is general, and denies every averment necessary to

(1) 2 Q. B. D. 48.
(2) At p. 60.
(3) 2 Q. B. D. 48, at p. 55.
(4) Law Rep. 8 Q. B. 102, at p. 105.
(5) 1 Notes to Saund. by Williams, at p. 261.

constitute the offence, in other words, every averment which is a necessary part of the indictment, and does not deny what is totally omitted therefrom. That which is totally omitted from the indictment is no part of the dispute when issue is taken upon the plea of not guilty, and the jury must find for the Crown, if everything stated on the face of the indictment is proved to be true. Therefore, it is true to say that every averment contained in an indictment, although inaccurately stated, is involved in the issue, and that the inaccurate statement of it is cured by the verdict, because after a conviction that inaccurate averment must be taken to have been proved adversely to the prisoner; and it is immaterial that the indictment would be bad before verdict by reason of that inaccurate statement. Therefore, I take the rule to be that an inaccurate averment is cured by verdict, but that an averment which is totally absent cannot be supplied even after verdict.

Now the third and remaining question is whether there is such a total absence in the present case of material words, that the defect has not been cured by the verdict. The introductory part of each count alleges that the book complained of falls under the category of an obscene libel; but that introductory part does not justify the total omission of the words, which are relied upon as constituting the crime. Now, what is charged as to those words? It is said the defendants did "print, publish, sell, and utter, a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy, and obscene book called the 'Fruits of Philosophy.' It is obvious that the title of the book, 'Fruits of Philosophy,' was not enough to be relied on. Words cannot be more innocent—they never were or could be relied upon as the obscene libel charged. That which was to be relied upon was something written in the book which was so called, and there is no description of anything contained in that book. What is contained in that book, is not even attempted to be described according to its tenor and effect. There is a total omission of the contents, and yet it was the contents, or some part of the contents, which was to be relied on by the Crown. The words complained of are necessary to the averment in the indictment, and the total omission of them cannot be cured by the verdict.

With regard to the American cases, I must say that, to my

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mind, they are either contrary to the law of England or in favour of the plaintiffs in error. A rule of practice seems to exist in the United States of America, that when an indictment contains an averment that the words are so obscene that if set out they would pollute the records of the Court, it is unnecessary to set them forth; but that where there is not this averment, the words must be set out, and if there is an omission both of the words and of the averment, the indictment is bad in arrest of judgment. Therefore the American cases, if they are to be regarded as authorities, are against the prosecution, and in favour of the plaintiffs in error in this case; because, besides the omission of the words, there is also the omission of that averment which is a necessary substitute for them. I confess, however, that I know of no authority saying that any similar rule exists in English law. I have read Lord Holt's view, as expressed in *Rex* v. *Sparling* (1), that the words of a blasphemous libel must be set out, however shocking they may be, and it seems to me, to say the least of it, a more robust rule to set out the obscene words upon the face of the indictment than to attempt to preserve the purity of the records, when the ears of every one in Court must be polluted by the words being read out before the judge and jury. I cannot follow the reasoning as to the advisability of the records of the Court being kept pure. It seems to me that it is a reason which does not bear examination, at all events, the principle that obscene words may be omitted if they are so obscene that they would pollute the records of the Court, is not the law of England, and if it were it does not apply to this case, as the indictment does not contain an averment that the words are too obscene to be inserted. Therefore, to my mind, this indictment is bad, and the plaintiffs in error are entitled to judgment. They are entitled to judgment, as all persons charged with crime in England are, for want of sufficient accuracy in the instrument by which they are charged.

This decision leaves the verdict really untouched. I confess I have felt humiliation in having to discuss such a question as this in the presence of one of the plaintiffs in error. We know not the particular ground on which the verdict passed; but it does seem to me sad that such a charge should have been brought against a

(1) 1 Str. 497.

woman. Although on a point of law the judgment in this case must be reversed, yet if the book complained of is published again, and the plaintiffs in error are convicted upon a properly framed indictment, the reiteration of the offence must be met by greater punishment.

COTTON, L.J. The question which we have to consider is, whether, on the indictment as framed, there is sufficient to support the judgment against the plaintiffs in error. Although it is a mere question of criminal pleading, it is nevertheless of considerable importance, because especially in criminal matters no departure should be allowed from those rules, which have been laid down for the purpose of guiding the Courts in the administration of justice. In the present case the offence charged is that of publishing an obscene libel. That offence consists of publishing obscene written words. Has any rule been laid down for framing an indictment for it? I cannot do better than take the rule quoted with approval by Lord Ellenborough in *Cook* v. *Cox*. (1) That rule, which was stated by ten judges, is as follows: "By the law of England, and constant practice, in all prosecutions by indictment or information for crimes or misdemeanours by writing or speaking, the particular words supposed to be criminal ought to be expressly specified in the indictment or information." (2)

This rule established so long ago as the reign of Queen Anne, has been ever since recognised, and to shew how uniform the practice has been, it is only necessary to refer to the numerous authorities and cases alluded to by Lord Justice Brett, amongst which I may especially mention *Wright* v. *Clements*. (3) Is there any authority to countervail this rule on behalf of the prosecution? Practically no decision has been quoted which enables it to be argued that this rule does not now prevail. The only English case which was referred to as not following the rule was *Dugdale* v. *Reg.* (4); but I wish to remark that in that case there was no decision that the actual words need not be set out; the point was not raised, and that case cannot in any way be looked upon as a decision meeting the long current of authority establishing and

(1) 3 M. & S. 110, at p. 116.
(2) 5 Har. St. Tr. 828.
(3) 3 B. & Ald. 503.
(4) 1 E. & B. 435; Dears. 64.

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following the rule. When a rule is so well established as this, it is almost unnecessary to consider what the reason of it is; but here certainly one reason is apparent, namely, that when words constitute the alleged crime, if the words complained of are not set out, the defendant is precluded from raising, either by demurrer or by proceedings in the Court of Error, the question whether or not the circumstances charged are in fact, according to the law of England, criminal; and it is of the utmost importance in dealing with cases of this kind, that it should not be considered whether or not in the particular case any injustice has been done to the accused persons, or whether or not they have suffered any substantial disadvantage. In my opinion we ought to adhere strictly to the principles and the rules which have been laid down, without nicely speculating as to whether any advantage or disadvantage exists in the particular case.

On what ground is it contended that this indictment is sufficient? I will first take the point which was principally relied upon in the Queen's Bench Division. I do not understand that either of the learned judges who decided the case in the Court below thought that, according to the English decisions, there was an exception to the general rule in this kind of libel. It is true the Lord Chief Justice does refer to the inconvenience of setting out libels of this sort, or books of this sort, on the indictment; but he does refer to, and expressly says, that he relies upon the decisions of the American courts, and I must therefore consider whether or not those decisions do justify the judgment in the Queen's Bench Division upon this indictment. We are in no way bound by the American decisions, their effect is simply that they may enable us to see how principles recognised by the law of England ought to be applied, by shewing us how learned judges in other countries have acted on those principles; but if in fact the judgments of the American courts are founded upon principles which we do not recognise, then of course those decisions are perfectly useless, and can be neither guides nor authorities. In the American cases referred to the judges certainly recognised the rule to which I have referred, and which I have quoted from *Cook* v. *Cox* (1); they recognised it as a general rule; but as against that general

(1) 3 M. & S. 110.

rule they rely upon another, namely, that it is necessary to keep the records of the Court pure; but it was only upon an allegation that the book or libel in question was so gross that no records ought to be defiled by it, that they held the indictment to be sufficient without setting out the actual words relied upon. It might be sufficient to say that these cases have no bearing on the present, because there is no such allegation in the present case, and if the present indictment is held to be sufficient, every indictment for any offence in the nature of an obscene libel must also be sufficient, although it does not follow that general rule to which I have referred. But the matter does not rest here. Does the law of England recognise, so as to make it available for the prosecution, that rule upon which the judges in American courts rely? It is perfectly true that the English courts do require their records to be kept pure in this sense, that they will not allow their records to be the means of propagating defamation or obscenity under the pretence of its being part of a judicial proceeding. They will require anything impure or scandalous to be removed from their records when it is irrelevant to the matter to be tried, but if the matters on the records of the Court or in an affidavit are really relevant to the matter to be tried, they are not scandalous, and no principle recognised by the English courts requires any statement to be removed from their records, if relevant to the issue to be tried, simply because it is impure. Does the principle that the records must be kept pure justify the absence of what would otherwise be a necessary averment in the indictment, on the ground that it is gross and impure? In my opinion it does not, and for this reason, the duty of the Court is to administer justice, either as between party and party, or as between the Crown and those who are accused; and for the purpose of doing so it ought not to consider its records as defiled by the introduction upon them of any matter, which is necessary in order to enable the Court to do justice according to the rules laid down for its guidance; a defendant has a right to say that he shall have fair notice, in order that he may not be prejudiced in defending himself against proceedings, whether civil or criminal, and therefore, in my opinion, the principle upon which those American cases are decided does not avail in this case. Those cases can be

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no guide or assistance to us. If it is desirable that in cases of this sort there should be an exception to the rule as to the statement of words, it is not the duty of the Court to make an exception; it must be for parliament to interfere, as it has done in other cases mentioned by Lord Justice Brett.

I think that disposes of the ground principally relied on in the Queen's Bench Division, but there is another ground to which I must refer, that is, that the defect has been cured by the verdict. The rule is very simple, and it applies equally to civil and criminal cases; it is, that the verdict only cures defective statements. In the present case the objection is not that there is a defective statement, but an absolute and total want in stating that which constitutes the criminal act, namely, the words complained of, and the judgment of Lord Ellenborough in *Cook* v. *Cox* (1) shews that the omission of words, when they form the substance of the offence, cannot be cured by verdict, when he says, "It is of the substance of a charge for slander by words that the words themselves should be set out." Here we have not the substance set out, we have not a mere defective averment; we have an absolute omission to aver that which was relied upon as lewd and indecent. My opinion is that the defect is not a matter cured by the verdict, and it is perfectly open to the plaintiffs in error to rely on this as a fatal defect in the indictment even after verdict.

In my view, therefore, this indictment is not framed in accordance with settled rules, and neither on authority or principle can the omission of the words complained of be excused, and this judgment cannot stand.

Judgment reversed.

Solicitor for the prosecution: *T. J. Nelson.*

(1) 3 M. & S. 110.

[IN THE COURT OF APPEAL.]

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Feb. 1.

HOGARTH *v.* LATHAM & Co.

Bill of Exchange—Blank Acceptance—Authority of Partner to accept a Bill in Partnership Name.

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The plaintiff and C. were partners, and the defendants, L. and F., carried on in partnership the business of shipbrokers. C. being in debt to the plaintiff and being pressed by him for payment, delivered to him two bills purporting to be accepted in the partnership name of the defendants; at the time of handing over the bills to the plaintiff, no drawer's name had been filled in, but C. stated to him that the consideration consisted of coals supplied. The plaintiff received the bills, believing that they had been lawfully accepted; but he afterwards began to suspect that there was something wrong. After his suspicions had been aroused, he filled in the names of his firm as drawers. It afterwards appeared that F. had accepted the bills without the authority of L.

Held, that the plaintiff could not recover upon the bills against L.

ACTION on two bills of exchange by indorsee against acceptors.

At the trial before Hawkins, J., the following facts were proved. The plaintiff carried on the business of provision merchant in London in partnership with Cotton, under the name of Hogarth & Cotton. The defendants were shipbrokers at Dover, the members of the firm being Forster & Latham. Before February, 1876, Cotton borrowed of the plaintiff on his private account sums amounting to 3000*l*. Before the 15th of February the plaintiff pressed Cotton for repayment of the loan, and Cotton thereupon promised to give the plaintiff two bills of exchange, to be accepted by the defendants, which he stated he should very shortly receive, and further stated, in answer to the plaintiff, that the consideration for the bills was for coals supplied for the use of the steamship *Castalia;* the plaintiff, knowing that Cotton was connected with the steamship company that owned the *Castalia*, accepted this explanation. On the 15th of February Cotton sent the bills sued on to the plaintiff; they purported to be accepted by Latham & Co.; the bills were in every respect perfect except that the drawer's name was blank. The body of the bills was in Cotton's handwriting, they were at three months' date, and were drawn "pay to our order:" the acceptance was in Forster's handwriting. It was admitted that he had no actual authority to accept bills in

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the name of the firm. Cotton stated to the plaintiff, that he had arranged with Latham & Co., that the bills might be drawn in the name of Hogarth & Cotton, in order that the plaintiff might the more readily discount them with his bankers. In May, before the bills became due, the plaintiff filled in the names of Hogarth & Cotton as drawers and indorsees, and his own name as indorsee. The bills fell due on the 18th of May, but were not presented at the request of Cotton. From the month of May to July, Cotton paid to the plaintiff sums of money from time to time on account of the bills. On the 3rd of August Cotton absconded, and a few days later Forster also disappeared. It was admitted that the plaintiff had given value for the bills. There was no evidence of a general usage to draw bills in blank, but there was some evidence that in mercantile transactions it was frequently done, and that it was usual not to fill up the blank until the bill was wanted to be discounted or presented.

The jury found that the plaintiff, when he received the bills from Cotton took them bonâ fide, believing them to be perfectly good bills, but afterwards, and at the time he filled in the names of Hogarth & Cotton, suspected that there was something wrong.

The learned judge directed judgment to be entered for the defendant Latham.

The plaintiff appealed.

Jan. 31; Feb. 1. *Cohen, Q.C.*, and *R. M. Bray*, for the plaintiff.

McIntyre, Q.C., and *Wheeler*, for the defendant, Latham.

The arguments are sufficiently stated in the judgments hereinafter set forth; the following cases were cited: *Snaith* v. *Mingay* (1); *Cruchley* v. *Clarance* (2); *Attwood* v. *Griffin* (3).

BRAMWELL, L.J. I think that the judgment must be affirmed. With the exception of *Chemung Canal Bank* v. *Bradner* (4) and a case which I tried at the last Chester assizes, I have never heard of an action such as this. The facts of the case at the Chester assizes were almost identical with the present; there, however, the firm

(1) 1 M. & S. 87.
(2) 2 M. & S. 90.
(3) R. & M. 425; 2 C. & P. 368.
(4) 44 New York Rep. (5 Hand) 680.

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who purported to accept the bill were really indebted to the person to whom it was sent, and if the bill had been drawn by the creditor upon the defendants in that action it would have bound them as it was a bill for value, and the partner who sent it would have had authority to forward it; but as it was drawn in blank and sent to the creditor who handed it to the plaintiff in the action, who filled it up, not with the creditor's name but with his own, I ruled that it was not a mercantile business transaction and that it was not within the authority of the partner to bind the firm. This is a weaker case, because, as it must be assumed, no debt was due from the defendant's firm to Cotton, and I am of opinion that it was not a mercantile business transaction and was not within the presumable authority of the partner Forster. Anybody who takes such an instrument as this, knowing that when it was accepted the bill had not the name of any drawer upon it, takes it at his peril and must shew that in fact the partner who did not write the acceptance authorized the attaching of the partnership name to the document with intent that it should be filled up by any person who got it. Mr. Bray has told us that we shall put a restriction upon the circulation of bills of exchange, if we decide against the plaintiff. I think, on the contrary, that we shall be laying down a good rule, which will protect honest traders against the acts of their fraudulent partners. Mr. Bray said that if one member of a firm drew a cheque on a bank payable to A. in respect of a debt due to B., he would be exceeding his partnership authority. As between the bank and the partners he would not, because the bank could not tell that it was so. Then Mr. Bray ingeniously said, supposing the holder of the cheque brought an action, could not he maintain it although the partnership authority had been exceeded? As to that I should like to take time to consider the point, when the case arises. I am not prepared to say that if A. and B. owe a debt to C., one partner without the authority of the other has any right to make the cheque payable to D., at all events without something to shew that it has been given in satisfaction of C.'s debt. I should not like to lay down a rule upon this point. I can imagine cases, where it would be monstrous to hold that the firm were not liable, if it really turned out that there was a debt due to C., and that C.'s debt would be satisfied on payment of the

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cheque. I should be very unwilling to hold that such a document as that was not within the partnership authority, and I should be very unwilling to hold that if the firm of A. and B. owed C. a sum of money, and a bill was accepted in blank by one of the partners and sent to C., and C. put his name in as the drawer, the other partner was not bound, though he did not know of it and had given no special authority for its being done. But it would be a perfectly immaterial question if the bill passed into the hands of a bonâ fide holder; in that case the firm would be liable. If it remained in the hands of the drawer, if the debt was due to him, it would matter very little whether he could recover on the bill of exchange, because the debt was due to him. I say nothing about that, but in this case in point of fact no debt was due to Cotton, although the plaintiff may have supposed otherwise owing to Cotton's statement. A bill of exchange supposes value, and is a negotiable instrument; but I am not at all sure that a man who takes what is not a negotiable instrument has a right to presume any value, or that he does not take it at his peril if there is no value. But supposing that the plaintiff had a right to assume value between Cotton and the defendant's firm, yet since the acceptance was in the handwriting of one partner only, I am of opinion that he had not as against the other partner and as matter of right the power of putting in his name as the drawer, he not being the creditor; and that as he did put in the name of his firm as drawers, he must shew that the partner whose writing is not on the bill authorized his partner to put that document into circulation and gave authority to any holder to put in his name as drawer. I am of opinion that there was no evidence of partnership authority here—certainly none in point of law. Evidence was given that it was a common practice for persons to accept bills of exchange in blank and remit them to their creditors. I dare say it may sometimes happen that a tradesman may write his acceptance across a piece of paper and send it to a wholesale dealer for the amount of the debt that is due to him, but with the intention that the creditor shall put his own name and not anybody's else; and with very great respect to the judges who decided the case of *Harvey* v. *Cane* (1), I should

(1) 34 L. T. (N.S.) 64.

doubt very much whether in such a case as that anybody else who puts his name does not put it at the peril of having to shew that the acceptor of the bill gave him authority to do it. It is one thing to authorize a creditor to put his name into a bill, and it is another thing to authorize him to insert the name of a third person. I cannot help referring to *Awde* v. *Dixon* (1). Baron Parke there says (p. 872): "I do not gainsay the position that a person who puts his name to a blank paper impliedly authorizes the filling of it up to the amount that the stamp will cover. Here the instrument to which the defendant's name is attached is delivered to his brother with power to make it a complete instrument on one condition only—that is, provided Robinson would be a joint surety with him. This, therefore, is an instance of a limited authority where, in case of a refusal by Robinson to join, there is a countermand. Robinson refused to join, and consequently the defendant's brother had no authority to make use of the instrument. A party who takes such an incomplete instrument cannot recover upon it, unless the person from whom he receives it had a real authority to deal with it. There was no such authority in this case, and unless the circumstances shew that the defendant conducted himself in such a way as to lead the plaintiff to believe that the defendant's brother had authority, he can take no better title than the defendant's brother could give. The maxim of law is "nemo plus juris in alium transferre potest quam ipse habet." It is a fallacy to say that the plaintiff is a bonâ fide holder of value, he has taken a piece of blank paper, not a promissory note. He could only take it as a note under the authority of the defendant's brother and he had no authority: consequently the instrument is void as against the defendant." This reasoning is applicable here, and to my mind there is no reason why the plaintiff should recover, and there are reasons why he should not.

It was said by Mr. Cohen that this was a negotiable instrument even before the holder's name was put into it. I am of opinion that it was not, and that the cases do not shew that it was. *Harvey* v. *Cane* (2) has been relied upon, but that case wholly differs from the present, for there was only one acceptor who himself accepted in blank. There are, however, some cases that shew that an incomplete

(1) 6 Exch. 869. (2) 34 L. T. (N.S.) 64.

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instrument may be made complete by a person to whom it was not originally handed, not on the ground that it was a negotiable instrument, but on the ground that the defendant, when he parted with it, must be taken to have given authority to any one into whose hands it might come to fill up the blank. It is not, therefore, a negotiable instrument, but authority has been given to every bonâ fide holder into whose hands it may come to make it a perfect instrument.

But the answer to that argument is that, before the plaintiff purported to exercise the supposed authority, he knew, not indeed that it was revoked, but that it never existed. A presumable authority exists in a partner of a trading firm to bind his partner by an acceptance. If I go to a man and say, "There is no such authority between me and my partner," he may draw a bill of exchange upon the firm; but he can maintain no action against me upon it, although accepted by my partner. The result follows not upon the ground of the authority being revoked, but upon the ground of his knowing that the presumable authority does not exist. In like manner the plaintiff before he filled up this instrument knew the presumable authority, or rather presumable power in the partner to give him the authority, did not exist; and therefore he knew that he himself had no authority.

As I am adverse to the plaintiff upon the point which I have mentioned, it is unnecessary to consider whether, if he had filled the instrument up at the time of receiving it, he might have made it a binding instrument, and he would have had a right to suppose that Forster had power to bind the defendant, his partner, and that he had himself had authority to fill up the bill. But I may say that although it may seem a little hard upon him perhaps that he should be worse off because he did at a later period that which he might have done at an earlier period, yet as he did not fill in the bill at the time when he might possibly have supposed he had authority to do it, he could not fill it in after he had received information which aroused his suspicions.

It has been said that if this bill got into the hands of a bonâ fide holder, that is, if Hogarth had indorsed it to a bonâ fide holder, the bonâ fide holder could have maintained an action. I am inclined to think that this argument is right for this reason—

A partner in such a firm as this has power to accept a bill of exchange; a bonâ fide holder would have taken what upon the face of it would have been a perfect bill of exchange, and the defendant could not say to him, as he says here to the plaintiff: "You knew as a fact that it was a question whether there was actual authority to do this, and not a presumable authority." The bonâ fide holder would be entitled to say, "I have given credit to the partnership signature to an instrument valid upon the face of it, and I am entitled to recover." The difference between that case and the present case is this, that there the holder would not have had the notice which the plaintiff had upon this occasion.

I think that the judgment was right, and I think so without imputing any fraud to the plaintiff in this matter. To some extent it may be a hard case upon him. If he had not had this piece of paper which he thought he might fill up, he would possibly have pressed his remedies against Cotton all the more; but in my judgment our decision should be in favour of the defendant.

BRETT, L.J. In this case the plaintiff brought an action against the two defendants Latham & Forster. Forster allowed judgment to go by default; and the question is whether the action is maintainable against Latham. Apart from the instrument sued on, no privity existed between the plaintiff and the defendant, and therefore the plaintiff is driven to rely upon the instrument itself. That instrument purports to be a bill of exchange drawn by Hogarth & Cotton and accepted by Latham & Co. It seems to me that as against Latham the plaintiff must shew either that the bill was drawn by Hogarth & Cotton or by their authority, and was accepted by, or by the authority of, Latham & Co., or he must shew that he had a right to believe and did believe that the bill was drawn by Hogarth & Cotton, and was accepted by Latham & Co. with Latham's authority. In my opinion the plaintiff fails to shew that he had a right to believe that the bill was drawn by Hogarth & Cotton, and he equally fails to shew in this case that he had the right to believe that the bill was accepted by Latham & Co. with the authority of Latham. With respect to the drawing

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by Hogarth & Cotton the bill never was in fact drawn by Hogarth & Cotton. The person who signed the names of the drawers was the plaintiff himself, and the alleged drawing upon which he has to rely is a signature of the alleged drawers, made by himself. He cannot therefore rely upon it as a drawing by Hogarth & Cotton, unless he can shew that he had a right to believe that he had the authority of the firm of Latham & Co. to put the names of Hogarth & Cotton as drawers.

Now what are the facts in the case? The acceptance was given to the plaintiff by Cotton upon what was in fact the representation to him that Cotton was the person who had a right to draw the bill. Therefore the first representation made to him was that Cotton was in fact the drawer, but the acceptance was offered to him as an acceptance in blank. It seems to me that the utmost which at that time he had a right to assume was, that the defendants were willing to accept a draft, in which Hogarth & Cotton's name might be put; but it does not seem to me that even at that time he had any right to suppose that he might put in the name of anybody else. I have seen no case which goes the length of saying that the plaintiff could fill in the name of a third person. But at the time that he received the bill if he supposed that he had authority he did not exercise the authority, and there was no drawer to the bill. The plaintiff has to shew that he had the right to suppose that Hogarth & Cotton could lawfully be made the drawers of the bill. Even if he had the right to suppose that Cotton might give him authority to put in Hogarth & Cotton's name he did not do it at first, and before he inserted a drawer to the bill he in effect knew that Cotton had not the authority of Latham & Co. Therefore, at the time that he with his own hand made a drawer to the bill, he knew in effect that the defendant had given no authority to draw the bill. Under those circumstances it seems to me impossible to say that he had a right to believe that Hogarth & Cotton were lawfully the drawers of the bill, the alleged drawing in fact being done by his own hand at a moment when he knew that Latham & Co. did not authorize him to draw the bill.

Even if we assume all the cases to have been correctly decided and to bear out the propositions for which they have been cited,

none of them go the length necessary to support the plaintiff's intention, for even if I have to agree entirely with the case of *Harvey* v. *Cane* (1) it does not go that length. That is all that it is necessary to say now, and I reserve to myself the power of considering whether or not that case was rightly decided, whenever the question comes before us. Even *Chemung Canal Bank* v. *Bradner* (2) does not go this length, because there at the time the blank was filled in there was no evidence of knowledge that there was no authority to fill in the name. It seems to me to be contrary to every rule of law as to principal and agent and to every rule of mercantile law, to suppose that this plaintiff had the right to assume that Hogarth & Cotton could be lawfully made the drawers of the bill. They were not the drawers of the bill. The plaintiff had no right to assume that they were, and therefore he cannot rely upon the drawing of the bill.

The acceptance of the bill was not authorized either expressly or impliedly by Latham. It was not an acceptance which Forster was entitled to give in respect of a partnership transaction, for there was none. Therefore neither expressly nor impliedly did Latham authorize Forster to write this acceptance.

Then comes the question whether the plaintiff, even supposing he was otherwise entitled to succeed, had a right to assume, contrary to the fact, that this acceptance was authorized by Latham. Now until a custom of merchants is proved, and proved so satisfactorily that the Court may afterwards take notice of it, to the effect that it is an ordinary transaction for one partner to draft an acceptance in blank and to deliver it, so that any person who takes it may have a right to fill up the drawer's name, I shall agree with Lord Justice Bramwell in what he held at Chester, that an instrument thus drawn is invalid. Was such a custom proved in this case? I think it was not. Mr. Bray has made a strong observation that this point was not taken, and that therefore we ought to say that he might have proved it. But I think the utmost that we are entitled to assume is that he might have had other witnesses to prove the same thing which the one witness proved, and if he had had twenty witnesses to prove the same thing which the witness who was called did prove, it does not seem to me that he

(1) 34 L. T. (N.S.) 64. (2) 44 New York Rep. (5 Hand) 680.

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would have proved a custom binding to the extent that it is necessary for him to go. Therefore I come to the conclusion that the person who takes an acceptance with the drawer's name in blank has no right to say that he may assume that that acceptance entitles any holder to put in any name which he may think fit. I agree with the ruling of Lord Justice Bramwell at Chester. Of course if such a custom should hereafter be proved, that custom will overrule the present principles of law.

I therefore in the result think that here the plaintiff had no right to assume that the drawing was by those who purported to draw, and he had no right to assume that the acceptance was an acceptance by the persons who purported to be the acceptors—that is that it was an acceptance by Latham & Co.—it was not in fact drawn by those who purported to draw it, it was not in fact accepted with the authority of Latham; and therefore the plaintiff fails on both grounds, and the judgment was right; and I think that the reasoning in *Awde* v. *Dixon* (1), though the facts are not in point, fortifies us entirely in the conclusion at which we have arrived.

I wish to say that I give my opinion upon the draft in the form in which it is, and viewed under all the circumstances which accompanied it. If it had been indorsed on to another person, and held for value, I should have thought that that person could sue Latham upon this acceptance.

COTTON, L.J. I am of opinion that the appeal must fail. The action is brought on a bill of exchange alleged to have been drawn by Hogarth & Cotton on the defendant's firm. The only question is whether Latham is liable, his partner, who was the actual party to the transaction, having suffered judgment to go by default.

The plaintiff alleges that he became the holder of a negotiable instrument for value without notice of there being anything unlawful about it, and therefore he is entitled to succeed. The question is whether the plaintiff had notice of any illegality. At the time when he actually received this instrument it was an acceptance and not a bill, that is to say, it was a piece of stamped

(1) 6 Exch. 869.

paper with the acceptance of Latham & Forster, the defendant's firm, written on it, but there was no drawer's name; that was left in blank. It was conceded in the argument, and it could not be disputed, that at the time when the plaintiff got possession of the document, it was one on which he could not sue legally—this admission is fatal to the contention that he then had a negotiable instrument. As I understand the law, a negotiable instrument, either by mere delivery where it is payable to bearer, or by indorsement where it is payable to a particular person, enables the right of action to be transferred. But here no right of action was created by the possession of this document, when it came into the hands of the plaintiff. How did he acquire any right to sue? He says that this was an acceptance by the defendant's firm empowering any one who liked to fill it up and make it a draft on the firm, that is to say, that any one who might receive this document had authority from the defendant to fill it up and put in his own name as drawer. At the time when the plaintiff received the acceptance, could he think that he had the authority of the firm to fill it up because he had the authority of Forster? I am of opinion that he did not and could not so think. In the present case I do not think it necessary to discuss what is the result of a single individual writing his acceptance on a piece of paper with no drawer's name, namely, whether a drawer's name can afterwards be inserted. Another question may hereafter arise, namely, whether it is within the partnership contract that one partner should bind the firm by writing the name of the firm as acceptor on a blank draft. In my opinion it is not within the partnership contract. But, in reality, those two questions do not arise here, because the allegation of the plaintiff is that he had the authority of the defendants to fill in the names of Hogarth & Cotton as drawers, and the question is whether at the time when he so affixed their name to the instrument he could make it one on which he could bring his action. It is true that when he got the piece of paper he knew nothing wrong about it; but although there is no fraud upon his part, yet at the time when he filled in the names of Hogarth & Cotton as the drawers he did know that there was something wrong—he had notice that in fact this was a fraud by Forster on his partner. He

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knew that Forster never was in a position to give the authority of the firm to him to fill in Hogarth & Cotton's name to the blank draft which Forster had accepted in the name of his firm; it is not a question of Latham revoking any authority given to Forster after some person had acted upon the authority by giving value or putting himself in a worse position by acting upon it. The position of partner impliedly gave Forster power to use the name of the firm for all purposes within the partnership contract; but at the time when the plaintiff filled in the names of the drawers, he had notice that the authority purporting to be given did not exist, that is to say, that Forster had no right to give the authority of the firm to the plaintiff to draw this bill upon them. I am of opinion, therefore, that as at the time when he made this an apparently perfect instrument, he had notice that Forster had no authority to bind the firm, he cannot sue upon the instrument. In my opinion he must fail, and the judgment is right. I take it as a question simply between two innocent persons. It is simply a question whether or no there is a legal right on the part of the plaintiff as against the defendant.

Judgment affirmed.

Solicitors for plaintiff: *May, Sykes, & Batten.*
Solicitors for defendant, Latham: *Woodwards & Co.*

Aug. 6.

[IN THE COURT OF APPEAL.]

ALLHUSEN *v.* LABOUCHERE.

Practice—Striking out Interrogatories—Party—Witness—Questions to Credit Answers tending to Criminate—Order XXXI., Rule 5.

A party who applies to strike out interrogatories must, unless they are altogether an abuse of the practice of the Court, specify those to which he objects.

Questions which go merely to the credit of the witness, and might be put in cross-examination, cannot be put as interrogatories to a party, and are as such irrelevant.

Where the answer to an interrogatory might tend to criminate the person interrogated, he may refuse to answer, but the interrogatory is not therefore objectionable.

THE action in this case was for damages to the credit and reputation of the plaintiff, caused by libels published by the defendant

in a journal called 'Truth,' of which he was the proprietor. The alleged libels accused the plaintiff of misconduct as a director of the Royal Aquarium and Winter Garden Company, and also in connection with a company called the Newcastle Chemical Works Company. The defendant delivered interrogatories for the examination of the plaintiff. The interrogatories were thirty-three in number, of which some appeared to be irrelevant, and others intimated that the plaintiff had concurred in acts which amounted to crimes.

The plaintiff took out a summons to have the interrogatories struck out. The summons came before Hawkins, J., in chambers, who made an order to strike them out. His Lordship stated that he had read the interrogatories, and that he was inclined to allow some of them to be put, but that it was not the duty of a judge to examine interrogatories en bloc, and as several could not be put, he thought it better to disallow them all.

From this order the defendant appealed to the Divisional Court of Queen's Bench.

1878. July 17. *Crump*, for the defendant.

Sir H. Giffard, S.G., and *A. L. Smith*, for the plaintiff.

KELLY, C.B. I am not about to lay down any general rule or principle applicable to the question of allowing or disallowing interrogatories, but with respect to the case before us it is quite enough to say that at the outset we are referred to several interrogatories which do not in the least degree relate to the conduct of the plaintiff in this cause—or in the slightest degree refer to any portion of the libel, except where the libel attacks a Mr. Robertson, not a party to this cause, though mentioned in the libel. We see that several of these interrogatories taken together import a clear specific charge against Mr. Robertson, of having defrauded the company of a number of shares by allotting them to persons with whom he was acquainted or connected—possibly friends of his own—without the knowledge of the company, and without any money being paid into the pockets or possession of the company on account of these shares. Under these circumstances, that really is a charge of a criminal offence made against Mr. Robertson, and if it were to appear in any other part of the libel or in any other

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part of these interrogatories that the plaintiff was at all a party to these acts of Mr. Robertson, the answers might make out the plaintiff to be guilty of a conspiracy to defraud the company of shares to a considerable amount, for which, if convicted, he would be liable to severe punishment. How, then, are we to deal with the case as to the other interrogatories? We are asked to go through them one by one, and say which shall be allowed and which shall be disallowed. It is impossible for the public time to be, I will not say so wasted, but so bestowed, upon such matters as that we are, while sitting in court, to go through these thirty-three interrogatories in order to see if here and there we could light upon one which, if standing alone, would be admissible, and would be a proper interrogatory to be exhibited; still less can we be supposed to perform that task by taking home the interrogatories and considering if any of them should be allowed, especially when we find that that task, to which no judge should be subjected either in chambers or in court, has been performed by another judge. We are asked to go through them again, and to overrule the discretion which he has exercised and the judgment which he has given. That is conclusive of the matter. Where a number of interrogatories are exhibited, it lies upon the party claiming the right to exhibit them to shew that if there be one or two that ought not to be exhibited, they are exceptional only, and to shew that the great majority of them are relevant to the case, and such as the law allows him to exhibit. I think, from all we have heard with reference to these interrogatories, that the majority of them would be found not in any way admissible or such as we ought to allow. Upon the ground, therefore, that those to which our attention has been chiefly called are wholly irrelevant, upon the ground also that others tend to invade the sound principle of the law of England that no man should be called upon in a court of justice, or in any proceedings emanating from a court of justice, to criminate himself, I think these interrogatories ought to be disallowed, and therefore that this motion should be dismissed.

MELLOR, J. I have not sufficiently looked at the interrogatories to see whether the answers to them would necessarily, if given in one way, tend to criminate the party, but I am very

much opposed to suffering the principle of not compelling a man to answer such questions (which I consider to be an elementary principle of jurisprudence) to be frittered away by allowing such interrogatories to be put. In the face of the judgment of the Court of Appeal in *Fisher* v. *Owen* (1), I do not wish to pass an opinion upon these interrogatories as being within that principle so as to require their rejection, but I base my objection upon the ground that if a party administers interrogatories, he ought to be careful how he mixes up genuine interrogatories with interrogatories that ought not to be allowed. I think the discretion is one which the judge applied to may well exercise in regard to particular interrogatories, and if it can be pointed out that there are in the interrogatories a large number which are likely to embarrass or which are inadmissible, I think the judge is justified in saying, "I shall refuse them all, because I am not called upon to go into each interrogatory." It would be right that to that extent the judge should look into the interrogatories and see whether they are proper, but when you appeal against the decision of the judge I think you ought to appeal upon some question of principle. Whatever the objection to putting that labour upon the judge at chambers may be, it certainly is not proper to throw the same labour upon a Court of Appeal. If any interrogatory had been singled out, I think it might be a case for appeal on the ground that the judge had wrongly exercised his discretion. But that only arises when you can distinguish reasonably and sufficiently between the interrogatories administered. The first interrogatory here is a remarkable specimen of the mischief to which I have referred, as having nothing to do with the case. I think that that is enough to guide any judge in reference to the rest of the interrogatories. It would be a dangerous precedent for us, sitting as a Court of Appeal from a judge at chambers, to go into the question whether interrogatories had been properly struck out by a judge unless some question of principle is involved. Being satisfied with the discretion exercised by the learned judge, I am quite prepared to say that the interrogatories should be disallowed, and therefore the motion must be dismissed.

Motion dismissed with costs.

(1) 8 Ch. D. 645.

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The defendant appealed.

Aug. 5, 6. *Crump*, for the defendant. The judges of the Divisional Court did not approve of the decision in *Fisher* v. *Owen*. (1) All these questions might have been asked of the plaintiff in cross-examination, and can therefore be now asked.

Sir H. Giffard, S.G., and *J. C. Hannen*, for the plaintiff. The judge in chambers considered these interrogatories generally an abuse of the practice of the Court, and refused to sift them. Many of them are in fact fresh libels, and the whole ought to be struck out. If they are relevant it may be no objection that the answers might tend to criminate the plaintiff, but these interrogatories are clearly unfair and improper. In such a case as this the judge is not bound to dissect the interrogatories and find out which are good, but is justified in striking them all out.

Crump declined to reply.

JAMES, L.J. I am of opinion that the judgment in the Court below in this case cannot be affirmed. I am unable to agree with the principles which it appears to me, if one may say so, are rather adumbrated than expressed clearly in the judgment of the two judges, who disposed of this matter on appeal from Mr. Justice Hawkins, or with the judgment of Mr. Justice Hawkins himself. A judge is, under the existing system, not called upon to refuse or to allow interrogatories en bloc, but the party administers at his own risk such interrogatories as he thinks he ought to have answered. The person to whom the interrogatories are administered may decline to answer them if they are irrelevant, or for any other cause which, according to the law of England, entitles him not to answer. Also he is enabled to do this: if the interrogatories are open to objection under Order XXXI., Rule 5, because they are either irrelevant or not administered bonâ fide or for any other cause of that kind, he may take out a summons to strike out the interrogatories which are objectionable, pointing out, as it appears to me, those which are objectionable. That seems to be the proper course, and when the judge who disposed of these interrogatories in the first instance disposed of them because, as he said, they were

(1) 8 Ch. D. 645.

thrown at him en bloc, and he would not take on himself to dissect the mass, he appears to me, with all due deference, to have applied that objection to the wrong party. The person who had thrown the matter at him en bloc was the person who had called upon him to strike them all out, and who had not taken the trouble to go through them and reduce into words or form those objections which he, with the assistance of his attorney and counsel, had found or supposed he had found. I can conceive a case such that the whole thing, or the great mass of it, was so utterly irrelevant—so utterly outside the matter in litigation—that upon the mere look of them the judge could come to the conclusion that the interrogatories were not bonâ fide and were not delivered for the purpose of getting a real discovery as to the substance of the action, and by way of supporting the defence to the action. In such a case the judge would be right in saying, "the whole thing is an abuse, take your interrogatories back and reform them; it is much simpler to do that than to put your adversary to make his objections." In previous cases, and I think both with regard to statements of claim and defence this Court in which I am sitting as one of the members has dealt exactly in that way with these things. The Court has seen that there was so much which was utterly irrelevant and improper mixed up with so little that was relevant and proper that instead of striking out a part we have said, "Take it back." But here the judge has come to the conclusion that he would not go through the interrogatories and see whether there are many, or a substantial or a considerable part, or the majority of them, which are relevant and which are proper to be answered, but, finding many of them to be bad, that he would strike out the whole of them. With deference to the learned judge, I think that is not right, and what I should have done if the case had come before me at chambers (I am speaking not with much experience of business at chambers), I think that I should have said, "I cannot agree to your proposition, you being the moving party, that the whole is ex facie an abuse of the Court. You cannot ask me, and I am not going to take the trouble to go through all these interrogatories. Take them away and renew your application, telling your adversary what the interrogatories

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are to which you object, without putting him to the necessity of another summons." That, it seems to me, would have been a course which ought to have been taken. In that case the objectionable interrogatories would have been pointed out, and would probably not have been the subject of discussion or argument. That seems to be the error in principle into which the learned judge fell in dealing with the case as he did.

Then with regard to the principle upon which the appeal is brought. It appears to me that the judges looked upon it as the exercise of a matter of discretion and not of principle which was capable of being reviewed. More than this, one of the learned judges said that some of the interrogatories were bad, and he would not take the trouble of saying which were good and which were bad; and the Lord Chief Baron seemed very much struck with what was apparently, in his view, the impropriety of the decision of *Fisher* v. *Owen* (1), and thought it such a violation of everything that was established, according to the common law principles of this country, that it ought not to be followed. (2) Now I am bound to say, from my experience of interrogatories in the Courts of Chancery, that the decision in *Fisher* v. *Owen* (1) was entirely in accordance with everything that has been decided here. Nobody was ever allowed to object to a relevant question because that question tended to criminate himself. He might object to answer it, but it was never a ground of demurrer to an interrogatory, or a ground for striking it out, that the answer might involve him in a crime. I have known questions put to a man such as, whether he had not forged a bill of exchange, or forged a deed which was sought to be set aside by a bill in Chancery? Of course he would not be obliged to answer such questions, but the questions were put, and could not be objected to. I entirely concur in the principle of that decision of *Fisher* v. *Owen* (1); and until the House of Lords chooses to overrule it, it ought to be adopted and obeyed by other Courts as the decision of a Court of Appeal. That is the law of this Court, and it ought to be followed according to its true intent and meaning, and not frittered

(1) 8 Ch. D. 645.

(2) It was stated at the bar that the Lord Chief Baron had during the argument expressed himself to that effect.

away by nice distinctions. But, according to my view, no question can be put to a party except a question relevant to the matter in litigation, and a question cannot be put to a party merely because the answer may discredit him. It is not like the case of a witness. When a witness is put in the box he is unfortunately, and, I think, very often unfairly, exposed to be asked all kinds of questions about things that have occurred or been done, or omitted to be done by him in the course of his life, because the counsel says, "I am going to ask the jury to disbelieve his evidence, and am putting this to his discredit, and to shew that he is a person not worthy of credit." Luckily in this case, as far as the litigant is concerned, nothing of the kind can be done; no such questions ought to be put, and any such question, if put, ought not to be allowed. The matters to which he is questioned must be matters strictly material and relevant to something in issue between the parties, and if that is the limit, it appears to me that the chance of injury to him will be entirely, or to a very great extent, done away with.

The question is what order are we to make? I object to doing the work which ought to be done at chambers. I do not think it the business of the Court of Appeal to deal with interrogatories brought en bloc before the judge. I have pointed out what I think ought to have been done, and I do not see any other course but to allow this appeal, and to let the matter go back to the judge at chambers. I do not know whether a fresh summons will be necessary. Having looked through the interrogatories, my present impression is that a great part of them are really not relevant to the libel, or to any justification. On the whole I am of opinion that the order of the Court must be discharged, and the summons must go back to the judge below to deal with the interrogatories which are pointed out as being improper and irrelevant.

BRETT, L.J. As the case has been laid before us, it does not seem to me that the principle of *Fisher* v. *Owen* (1) is in question. I take that decision to be that where interrogatories are relevant, although the answer to them might criminate the person answering,

(1) 8 Ch. D. 645.

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that is to say, might make him liable to a criminal indictment, they must nevertheless be allowed, and he must himself elect whether he will answer them or not. It must be well known that I was one of the common law judges who thought that there would be very great danger in introducing into litigation arising from the daily occurrences of life the equity principle which might have been perfectly harmless in almost all equity proceedings. That, however, is past controversy, and the question has been settled by a Court of Appeal. But in the present case I think it necessary to consider rather precisely what I understand to have been the ruling of the judge at chambers. A large number of interrogatories are administered; a summons is taken out objecting to them—a general summons not particularising any one of the interrogatories—and I take the ruling of the judge at chambers to have been, that although the party objecting was prepared to state, or might have been prepared to state, to which of the interrogatories he really objected, and although the defendant might have been willing to meet the plaintiff as to those particular interrogatories, and although the interrogatories might be separated so that those which were not material to the issue might have been cast aside, and those which were material to the issue might have been allowed, yet the judge refused to enter into such an inquiry, holding that where many interrogatories are administered, a considerable number of which are irrelevant, although some of them are relevant, he would not entertain an inquiry as to which were relevant and which were irrelevant. He laid that down as a principle, and acted upon it as a principle, and in that I respectfully differ from him. That principle of his and that action of his were adopted by the Divisional Court, and of course, therefore, if one thinks he is wrong one is obliged to say that one differs also from the Divisional Court, and on the whole I do. Now, I should be very sorry to suggest any very strict form of procedure in chambers. The administration of justice in chambers has often been said to be an administration in a domestic forum. Of course it is not absolutely so, but something like it, and it is to the advantage of everybody that that practice should not be too strict—certainly that it should not be too technical. There may be a difficulty in stating that there ought to be a general

principle, but if a general principle is not followed, the judge must exercise his discretion in dealing with a mode of procedure which is not strictly regular. Now, taking as the basis the old Chancery practice as to interrogatories, it seems to me that the person administering interrogatories must administer such as he is advised to administer; that some of them may be suggested to be relevant, and some to be irrelevant; and that the person who objects to them is the person who, according to the form of procedure in Chancery, would have had to take his objections, and if he meant to object to the whole on the ground that they were an abuse of the Court to object to the whole on that ground; if again he meant to object to some of them on the ground that they were irrelevant, although others were relevant, he ought in his summons to point out those to which he objects, or it may be that he might take both points. Assuming him then to take both points, the judge would have first of all to consider the interrogatories as a whole, and say whether they were an abuse of the Court, and if he thought so he would so hold; but if he was not prepared so to hold he would have to consider those which were objected to in the summons, and he would allow or disallow them accordingly. Now, if he did allow or disallow particular interrogatories, I think that if he was wrong that would be matter of appeal, and not such a matter of discretion that the Court to whom the appeal lay, having the interrogatories and the pleadings before them, must not say whether they agreed with him. But although I think that the person objecting to particular interrogatories should enumerate them (not setting them out at length, but referring to them by number, which would be sufficient), yet I should be sorry to say that if he did not do so the judge should be bound, as a matter of course, to refuse to entertain objections to particular interrogatories. I think that a judge might, if he saw that it was for the benefit of the parties, say, "Although these objections have not been stated in the summons, yet if now that you are before me in my chambers, you can within a reasonable time point out to me those to which you object, I will deal with them." I think he might do so, although he would have a perfect right to refuse to look at them, and to dismiss the summons, or send it back to be amended, or send back the parties in order that

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the person objecting might object to particular interrogatories. But I cannot think that the judge is entitled to say, as a matter of principle, "I will not further consider this matter. There shall be no amendment, no adjournment, no inquiry. I have before me interrogatories which, if I did inquire into, I could separate, but I will not inquire into them because you have not separated them." Therefore, as it seems to me, we are now bound to do that which ought to have been done in chambers; that there should be no order on the summons, but without prejudice to the plaintiff taking out a fresh summons in chambers enumerating the interrogatories to which he objects.

COTTON, L.J. The order under appeal made at chambers and confirmed by the Court below is an order striking out the whole of the interrogatories. Now I do not for a moment doubt that in a case under the Orders, the Court has under particular circumstances a right to direct that the whole of a set of interrogatories shall be struck out. The Court may be perfectly satisfied that the interrogatories as a whole are not put bonâ fide for the purpose of the action. I use that term rather than that which has been used in the course of the argument of "an abuse of the practice of the Court," because if they are not put bonâ fide for the purpose of the action, that is abusing the process of the Court, and I rather use the language of the rules and orders under which we have to proceed than any other language. But the only ground, as I understand it, on which the Court has come to this conclusion is this: there were a great many of these interrogatories which in the opinion of the judge at chambers and of the judges in the Court below could not be properly put or allowed; and as the interrogatories were brought before them in a mass they imposed this penalty on the defendant who has filed the interrogatories that he must suffer from having mixed that which is bad with that which is good by having the whole of his interrogatories disallowed. Now in my opinion there was error here. Under the Rules of Court, in every Court either party to a litigation has a right to administer interrogatories for the examination of his opponent; of course subject to this, that he is asking for discovery, and is not to cross-examine the other party as to his credit, but is to get

discovery of facts which tend to prove or do prove issues material to the case. Under Order XXXI., Rule 5, the party to whom the interrogatories are exhibited may come before the Court and say, "I take upon myself to shew either that the whole of these interrogatories are irrelevant or not put bonâ fide for the purpose of the action; or that particular interrogatories are irrelevant or not put bonâ fide for the purpose of the action or for some other reason ought not to be allowed." The onus is on the party objecting to the interrogatories to shew what particular interrogatories offend, or that the whole of them offend, against the provisions of that rule, and if I may venture to say so, I think the learned judge at chambers and the learned judges in the Court below fell into an error in considering the burthen to be on the defendant who exhibited the interrogatories, and not on the plaintiff who objected to them. Because the matter was not put before them in such a way as that they could see what was objected to, they punished the wrong party by striking out the whole. Now, my opinion as regards what should have been done is, that the plaintiff objecting to the interrogatories should, if he could not make out to the satisfaction of the judge that the whole of the interrogatories were not put bonâ fide for the purpose of the action, have been called upon to say to what particular interrogatories he objected, and have thus put it for the judge at chambers, the judges in the Divisional Court, or the judges of the Court of Appeal to deal with. That is the duty thrown on them by these orders, and it is a duty which they must discharge, however much the public time may be taken up, and however difficult it may be for them in each particular case. My opinion is that the judges were wrong in saying they would not enter into the interrogatories, and say which were objectionable and which were not. Another matter was referred to by the Lord Chief Baron, but I doubt whether he decided the question on the ground that as some of the interrogatories were objectionable he would not separate the bad from the good, but would reject the whole, or whether he went on the principle that the interrogatories as a mass would, if answered, tend to criminate the plaintiff. Now there was a decision of the Court of Appeal in *Fisher* v. *Owen* (1),

(1) 8 Ch. D. 645.

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that it is no objection to interrogatories that the answer may tend to criminate the party to whom they are exhibited. It always has been the practice of the Court of Chancery, and that practice is now under the Act of 1873, s. 25, s.s. 11, universal, that it is no objection to an interrogatory, and no ground for taking the interrogatory off the file, if relevant, that the answer might tend to criminate the party to whom it is exhibited. He may say if he thinks fit, "I refuse to answer on the ground that the answer may tend to criminate me," but then he must take the objection on his oath, and if he does raise that objection on his oath in the proper way he is not bound to answer the interrogatory. That no doubt has been the practice which seems to me founded on principle, and I entirely adhere to the decision to which I was a party, that the fact that an answer to an interrogatory may tend to criminate the party is no ground under Order XXXI., Rule 5, or independently of that, for directing that interrogatory to be taken off the file. That being so, I think that this summons must go back for the purpose of being considered; that we ought not to have now thrown upon us, the Court of Appeal, to go through these interrogatories, and say which can and which cannot be properly put. I ought to add this in order that when it goes back to chambers there should be no misapprehension as to the view which the Court of Appeal takes. We do not decide as to many of these interrogatories that they can properly be put, or that all these various matters referred to by the interrogatories are matters relevant to the issue to be tried at the hearing of this case. I think it would not be right to express an opinion either way, but certainly I do not express an opinion that all these interrogatories can be properly put or refer to matters which are relevant. When they go before the judge at chambers, if they ever do go before him, and if afterwards through the series of appeals which may follow they come before us, our judgment will be given upon them, but at the present we give no opinion in any way favourable to many of these interrogatories.

JAMES, L.J. As to one or two of these interrogatories, there has been no attempt to justify them. I think that under the

circumstances the proper order will be that the costs here and in the Court below, and before the original judge, should be costs in the cause.

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Order discharged.

Solicitors for plaintiff: *Shum, Crossman, & Co.*
Solicitors for defendant: *Lewis & Lewis.*

[IN THE COURT OF APPEAL.]

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Dec. 11.

LEWIS *v.* BRASS.

Contract—Condition Precedent—Acceptance of Tender with intimation that formal Contract shall be subsequently prepared.

An intimation in the written acceptance of a tender that a contract will be afterwards prepared, does not prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned, if the intention of the parties was thereby to enter into an agreement, and if the preparation of the contract was contemplated merely for the purpose of expressing the agreement already arrived at in formal language.

CLAIM, that it was agreed between the plaintiff and the defendant, that the defendant should execute complete certain works for the plaintiff in such manner and upon such terms and within such time, as was then agreed upon, for the sum of 4193*l.*; but that the defendant omitted and refused to do the work, whereby the plaintiff suffered damage.

Defence, after denying the allegations in the claim, stated that the plaintiff intending to have certain work done at some houses belonging to him, through A. E. Hughes advertised for tenders; a contract between the plaintiff of the one part, and the builder selected to do the work of the other part, and containing the terms on which the same was to be executed, was to be prepared by the plaintiff's solicitors and signed by the plaintiff and such builder. A tender for the execution of the work was prepared upon the defendant's behalf and sent in, but afterwards, and before any contract had been entered into, the defendant discovered that a mistake had been made in the estimate upon which the tender was framed, and thereupon he withdrew the tender and declined

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to enter into any contract upon the basis of it for the execution of the work.

Reply, joining issue.

At the trial, before Hawkins, J., the following facts were proved: the plaintiff being desirous of making certain alterations in his premises above mentioned, sent, through his architect, A. E. Hughes, bills of quantities to several builders, inviting them to make tenders stating the amount at which they would be willing to execute the work. The defendant sent in a tender in these terms:

"I hereby agree to execute complete, within the space of twenty-six weeks from the day of receiving instructions to commence, the whole of the work required to be done in alterations and additions to the above premises, with the best materials, in strict accordance with the drawings and specification, and to your entire satisfaction, for the sum of 4193*l.*"

The plaintiff's architect thereupon wrote to the defendant in the following terms:

"I am instructed by my client, Mr. John Lewis, to accept your tender of 4193*l.* for works as above referred to. The contract will be prepared by Messrs. Underwood & Colman, Mr. Lewis's solicitors, and I have no doubt it will be ready for signature in the course of a few days."

The defendant afterwards found that he had made a mistake in his tender and thereupon withdrew it; the plaintiff then entered into a contract with certain other builders for the execution of the work, and was obliged to pay to them a sum greatly exceeding the amount mentioned in the defendant's tender.

Hawkins, J., asked the jury whether by the tender and acceptance, the parties intended to enter into a contract; the jury found that the plaintiff and the defendant intended that the tender and acceptance should form a contract; the learned judge thereupon ordered the judgment to be entered for the plaintiff. The defendant subsequently moved in the Queen's Bench Division for a new trial; but the motion was refused. The defendant now appealed from both the judgment of Hawkins, J., and the refusal of the new trial rule by the Queen's Bench Division.

Dec. 6, 7. *Arthur Charles, Q.C.*, and *Edwyn Jones*, for the defendant. The plaintiff's architect did not accept unconditionally the tender of the defendant, and the parties did not get beyond mere negotiation. The formal contract to be subsequently prepared, as intimated in the letter of the plaintiff's architect, must necessarily have contained further terms and conditions not agreed upon at the time of the correspondence; and until those terms and conditions could be ascertained, there could be no final agreement: *Crossley* v. *Maycock* (1); and the signing of a formal contract was a condition precedent to the parties being bound: *Rossiter* v. *Miller*. (2) The plaintiff's counsel may rely upon *Ridgway* v. *Wharton* (3); but that case really shews that an agreement to execute an agreement containing new and additional stipulations is a contradiction in terms, and that the circumstance of instructing the plaintiff's solicitors to prepare a formal agreement affords cogent evidence, that the parties did not intend to bind themselves until the contract should be reduced into form.

Herschell, Q.C., and *Horace Smith*, for the plaintiff. The nature of the transaction must be borne in mind, and the documents must be construed with reference to the subject matter with which the parties were dealing. If an offer is made and is accepted, there is a binding contract; if the acceptance be conditional upon something being done, for instance a contract being drawn up, then it is different. But this is a contract to do certain works upon certain specifications at a certain price and within a certain time; the defendant agrees that he will fulfil the contract with the usual stipulations. Suppose nothing had been said about the formal contract: the offer and acceptance would necessarily import all customary stipulations.

[BRAMWELL, L.J. If the defendant had begun the work, would he be paid anything until it was completed? By the ordinary rule of law he would be paid when the contract was completed; can a custom to pay by instalments be imported into the contract?]

It might be shewn that in that trade there is a custom to pay

(1) Law Rep. 18 Eq. 180. (2) 5 Ch. D. 648.
(3) 6 H. L. C. 238.

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by instalments, just as in a mercantile contract it might be shewn that payment was to be cash fourteen days after delivery. The law imports into the contract all the customs, which the parties can be supposed to have had in their minds when they entered into the contract: *Heyworth* v. *Knight.* (1) In the present case the acceptance does not contain any terms such as "subject to signing a contract," and it was not intended that the agreement was to be conditional upon signing a contract. The defendant never complained that terms were imposed on him which the plaintiff was bound not to put on him: he withdrew his tender because he found out that his prices were too low. The mere mention of a "contract" does not import in itself a condition. The words merely point to an embodiment of the terms agreed upon in a formal instrument. Here what is to be done is perfectly well ascertained on both sides, and the word "contract" does not make any difference, and the jury have found that the parties intended this to be the contract. None of the authorities affect the principle applicable to this case. In *Rossiter* v. *Miller* (2) the offer was made on conditions, and one of the terms was that a contract containing a number of conditions should be signed: until that was done, no contract was arrived at. *Governor, &c., of the Poor of Kingston-upon-Hull* v. *Petch* (3) does not turn upon the question whether there was sufficient evidence to go to a jury; the Court drew the inference of fact, that neither party intended the agreement to be a contract. The question really turns upon the construction of the documents: it seems a strange argument that there was no contract, but it was a mere negotiation, the jury having found that it was the intention of the parties to make the contract. The defendant cannot escape from liability merely because the cost of the work was miscalculated: *Scrivener* v. *Pask.* (4)

Charles, Q.C., in reply. A contract may be absolute upon the face of it, and yet be really conditional: *Pym* v. *Campbell.* (5) The learned judge ought not to have left any question to the jury; he treats the answer of the jury as if they said the two letters

(1) 17 C. B. (N.S.) 298.
(2) 5 Ch. D. 648.
(3) 10 Ex. 610; 24 L. J. (Ex.) 23.
(4) Law Rep. 1 C. P. 715.
(5) 6 E. & B. 370; 25 L. J. (Q.B.) 277.

should operate as the contract between the parties. The jury only said that the parties intended the tender and acceptance to be a contract, not the contract. There was no mutual assent to any definite terms, and hence no contract was arrived at: *Chinnock* v. *Marchioness of Ely.* (1)

Cur. adv. vult.

Dec. 11. The following judgments were delivered:

BRAMWELL, L.J. I think that the decisions appealed from must be affirmed. There was sufficient evidence to go to the jury that the parties were doing more than negotiating, and the entry of the judgment was right; but it has been argued in this court that the tender was not accepted "pure and simple," but with an additional term; and this contention was founded upon the circumstance that the letter of the plaintiff's architect, after stating that the defendant's tender was accepted, proceeded to say that the contract would be prepared by the plaintiff's solicitors. I do not take this to be the true construction of the documents; it was merely intended that a formal instrument should be drawn up, such as is usually prepared when works of magnitude are undertaken, and in support of this construction I may observe that the defendant made no objection to the letter from the architect. The acceptance therefore was pure and simple, and did not impose any additional terms. It is possible that the formal contract would have contained terms not specially mentioned in the tender by the defendant and in the letter from the plaintiff's architect, for instance, as to the payment of the contract price by instalments, or as to what part of the work was to be first commenced; but the defendant might have successfully objected to the introduction of such terms, and the work would have been proceeded with upon the terms contained in the tender and in the letter.

BRETT, L.J. I am of the same opinion. At the trial the question was whether at the time when the documents were signed the parties had a contracting mind; the jury found that they had, and thereupon according to the ordinary rule of law the true construction of the letters became a matter for the

(1) 4 De G. J. & S. 638.

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determination of the Court. I think that when the letter of the plaintiff's architect had been written and received, a contract was made and completed. The contract mentioned in the letter was merely formal. I think that the plaintiff is entitled to succeed.

COTTON, L.J. I should have added nothing, if it were not that reference has been made to *Rossiter* v. *Miller*. (1) In the case before us there are two appeals, one from the judgment at the trial before Mr. Justice Hawkins, and the other from the refusal of the Queen's Bench Division to grant a new trial. The jury have found that there was a contract between the parties, and I think that the evidence justified that finding. As the parties did intend to contract, we have to consider whether the tender and acceptance did in point of law constitute a contract. The tender is drawn up in formal terms, and it was followed by the letter of acceptance. When the existence of a contract is to be gathered from a correspondence, there must be an unqualified acceptance of the offer, and no term must be introduced; if a new term is introduced, there is no contract. It often happens that the language used is ambiguous, and doubts arise whether the parties are ad idem. If the plaintiff's architect by his letter introduced new terms, the acceptance was not unqualified; but I do not think that he did, and if it were not for the reference to the preparation of a subsequent contract, it could not have been argued that the contract was incomplete: no new terms as to the execution of the works or payment of the price are mentioned, and if any other terms were contemplated at the time of the negotiations, it was competent to the plaintiff not to insist upon them. I think that the rule of construction laid down in *Crossley* v. *Maycock* (2) is correct, and that the acceptance of an offer accompanied by the expression of a wish for a more formal instrument is sufficient to enable a court of justice to hold that a final agreement has been arrived at. The defendant has relied upon *Rossiter* v. *Miller* (1): I do not think that that case is at variance with our decision: there the Court held that upon the construction of the documents no final contract had been arrived at; and it is to be observed that by the conditions the purchaser was "required to sign a contract." The language

(1) 5 Ch. D. 648. (2) Law Rep. 18 Eq. 180, at p. 181.

used was different from that in the present case, and the decision is no authority against the conclusion to which we have come.

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Appeals dismissed (1).

Solicitors for plaintiff: *Underwood & Colman.*
Solicitors for defendant: *John Mackrell & Co.*

THE QUEEN, ON THE PROSECUTION OF BAKER, RESPONDENT; *v.* THE SPON LANE COLLIERY COMPANY, LIMITED, APPELLANTS.

1878 *June* 22.

Coal Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 76), *ss.* 46, 51, *sub-s.* 6—*Notice to remedy Danger from accumulation of Water in adjoining Colliery—Failure to withdraw Workmen.*

By the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 46, if in any respect (which is not provided against by any express provision of this Act or by any special rule) any inspector find any mine to which this Act applies, or any part thereof, or any matter, thing, or practice in or connected with any such mine to be dangerous or defective, so as in his opinion to threaten or tend to the bodily injury of any person, such inspector may give notice in writing to the owner, agent, or manager of the mine, and shall state in such notice the particulars in which he considers such mine or any part thereof, or any matter, thing, or practice to be dangerous or defective, and require the same to be remedied, and unless the same be forthwith remedied the inspector shall also report the same to a Secretary of State. If the owner, agent, or manager of the mine objects to remedy the matter complained of in the notice he may within twenty days after the receipt of such notice send his objection in writing, stating the grounds thereof to a Secretary of State, and thereupon the matters shall be determined by arbitration, &c. If the owner, &c., fail to comply with the requisition of the notice, where no objection is sent within the time aforesaid—within twenty days after the expiration of the time for objection—he shall be guilty of an offence against the Act.

By the General Rules (non-compliance with which is an offence under the Act), s. 51, sub-s. 6: If at any time it is found by the person for the time being in charge of the mine, or any part thereof, that by reason of noxious gases prevailing in such mine, or such part thereof, or of any cause whatever, the mine, or the said part, is dangerous, every workman shall be withdrawn from the mine, or such part thereof as is so found dangerous. . . .

The appellants were owners of a colliery in which was a perpendicular pit shaft at the same level as, and communicating with a similar shaft in an adjoining colliery, which did not belong to them. Notice was given the appellants by the district inspector of mines that an accumulation of water existed near to and in connection with their mining works, which was dangerous and tended to the

(1) See *Winn* v. *Bull*, 7 Ch. D. 29.

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bodily injury of the workmen employed therein, and requiring them "forthwith to remedy the matter." This accumulation of water was in the pit shaft of the adjoining colliery, and the defendants had no power to interfere with the water in it, but it was shewn that after the receipt of the notice they did not remove the men at work in their own pit shaft and colliery. The appellants having been convicted under the Act for failing to comply with the above notice:—

Held, by the majority of the Court, Cockburn, C.J., and Mellor, J., that the conviction was wrong, for s. 46 only enabled the inspector to give notice in cases where the danger specified in the notice was one which could actually be remedied by the occupier of the mine, and not in cases where the source of danger was beyond their control; and that the only remedy under such circumstances was that given by s. 51:

By Lush, J. (dissenting) that the conviction was right, for s. 51 did not affect the power of the inspector to give notice under s. 46, and the appellants' inability to remove the danger was the only ground for an objection to be sent by them to the Secretary of State; and that not having appeared and stated the grounds of their objection, they had failed to comply with the provisions of the section.

APPEAL to the Staffordshire Quarter Sessions against a conviction, reciting that the appellants, on the 12th of June, 1877, being the owners of a colliery called the Spon Lane Colliery, at Spon Lane, Stafford, being a coal mine or colliery within the true intent and meaning of 35 & 36 Vict. c. 76, were guilty of an offence against the Act, for that on the 12th of June, 1877, J. P. Baker, Her Majesty's Inspector of Mines for the district of South Staffordshire and Worcestershire, found a part of the mine to be dangerous, so as in his opinion to threaten or tend to the bodily injury of the persons at work in such mine, and gave notice in writing thereof to the company, and stated in such notice the particulars in which he considered the said part of the mine to be dangerous, and required the same to be remedied; and the appellants did not, within twenty days after the receipt of such notice, send to a Secretary of State any objection in writing or otherwise remedy the matter complained of in the notice, and failed to comply with the requisition of the notice within twenty days after the expiration of the time for objection. The conviction then adjudged the appellants for the offence to forfeit and pay 10*l.*, and the further sum of 10*s.* per day for every day after the notice that the offence should continue to be committed.

At the hearing the sessions quashed the conviction, subject to the following case:—

1. The appellants are the owners and occupiers of the lands

and coal mines called the Spon Lane Colliery, within the mines inspection district of South Staffordshire and Worcestershire, and the respondent, J. P. Baker, is Her Majesty's Inspector of Mines for such district.

2 and 3. The lands and coal mines of another colliery, called the Bromford Colliery, which, prior to the 12th of June, 1877, and then and thereafter were and still are the property of the Blakeley Hall Colliery Company, adjoin the Spon Lane Colliery.

4. On the Spon Lane Colliery are two perpendicular pit shafts. They pass from the surface of the earth down to a seam or vein called the thick coal, lying at a depth of 365 yards, or thereabouts, beneath the surface. One pit shaft is used for the purpose of drawing water through it from the mines. The other is used for the purpose of working the mines of the Spon Lane Colliery, by raising and lowering men and materials through the pit shaft. A water way communicates between the two pit shafts about seventy-four yards above the seam or vein.

5. On the Bromford Colliery is a perpendicular pit shaft. It passes from the surface of the earth down to the seam or vein which underlies both collieries, and is about on the same level as the two pit shafts previously mentioned, but the depth varies in other parts of the collieries, on account of the inclination of the seam and the faults or dislocations therein. At the date referred to in paragraph 2 this pit shaft had been disused nearly two years, and water had accumulated in it. Adjoining the Bromford and Spon Lane Collieries is another colliery called the Littleton Hall Colliery, which, prior to the 12th of June, 1877, and then and thereafter until the 5th of September, 1877, belonged to and was occupied by Mr. W. H. Dawes; but the pit shafts therein ceased working shortly after the stoppage of the working at Bromford Colliery.

6. Prior to the dates aforesaid much of the thick coal had been worked and gotten of the seam or vein at and in each of the collieries, and water entering into and accumulating in either of the collieries naturally passes from one to the other through the imperfectly collapsed gob and hollows of the workings in the seam.

7. Previous to the matters hereinafter mentioned the appellants'

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two pit shafts had been filled with gob or soil to a height of about seventy and seventy-five yards respectively from the bottom of the pits, this filling extending up to just below the opening of the headway, but water percolated through this stopping and was drained away in the usual manner.

8. On the 12th of June, 1877, twelve men employed by the appellants were working in the headway or inset. The top of the column of water then in the pit shaft of the Bromford Colliery was 120 yards above the level of the entrance to the headway or inset. And the respondent, J. P. Baker, considered that there was danger of the flow of water from the pit shaft increasing and flooding the headway in the appellant's colliery, and so endangering the lives of the men working therein.

9. The Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 46, applies to the mines aforesaid, and the respondent, James Phillip Baker, is an inspector duly appointed under s. 43 of the Act. The state of things described in paragraph 7 is not provided against by any express provision of this Act or by any special rule.

10. By sect. 46: "If in any respect (which is not provided against by any express provision of this Act or by any special rule) any inspector find any mine to which this Act applies or any part thereof or any matter, thing, or practice in or connected with any such mine to be dangerous or defective, so as in his opinion to threaten or tend to the bodily injury of any person, such inspector may give notice in writing thereof to the owner, agent, or manager of the mine, and shall state in such notice the particulars in which he considers such mine or any part thereof, or any matter, thing, or practice to be dangerous or defective, and require the same to be remedied, and unless the same be forthwith remedied the inspector shall also report the same to a Secretary of State.

"If the owner, agent, or manager of the mine objects to remedy the matter complained of in the notice he may, within twenty days after the receipt of such notice, send his objection in writing, stating the grounds thereof, to a Secretary of State, and thereupon the matter shall be determined by arbitration in manner provided by this Act, and the date of the receipt of such objection shall be deemed to be the date of the reference.

"If the owner, agent, or manager fail to comply either with the requisition of the notice, where no objection is sent within the time aforesaid, or with the award made on arbitration, within twenty days after the expiration of the time for objection or the time of making of the award (as the case may be) he shall be guilty of an offence against this Act, and the notice and award shall respectively be deemed to be written notice of such offence.

"Provided that the Court, if satisfied that the owner, agent, or manager has taken active measures for complying with the notice or award, but has not with

reasonable diligence been able to complete the works, may adjourn any proceedings taken before them for punishing such offence, and if the works are completed within a reasonable time, no penalty shall be inflicted.

"No person shall be precluded by any agreement from doing such acts as may be necessary to comply with the provisions of this section, or be liable under any contract to any penalty or forfeiture for doing such acts."

11. On the 12th of June, 1877, the respondent, J. P. Baker, having ascertained or believing that the facts stated in paragraphs 7 and 8 then existed, gave to the appellants the following notice in writing:—

"COAL MINES REGULATION ACT, 1872,
"35 & 36 Vict. c. 76, s. 46.

"NOTICE.

"To the Spon Lane Colliery Company, Limited, owners of the Spon Lane Colliery or mine.

"Whereas, on inspection and information in respect to the condition of the above-mentioned mine I find the following matter, viz., That a serious and increasing accumulation of water exists near to or in connection with your mining works at the above named colliery, and which may rush into your mine or pit shafts and overwhelm everything and everybody therein. And whereas I am of opinion that the said matter is dangerous and threatens or tends to the bodily injury of the workmen or any other persons employed therein and thereat. Now I hereby give you notice forthwith to remedy the said matter."

12. This notice was sent by post and received by the respondent on the 13th of June, 1877. The accumulation of water mentioned in the notice was not immediately reduced, and the respondent reported the same to a Secretary of State. The appellants did not within twenty days of the receipt of the notice or at any time send any objection in writing stating the grounds thereof to a Secretary of State.

13. The appellants having in the opinion of the respondent failed to comply with the requisition of the notice he laid an information in writing against them on the 16th of August, 1877, before a justice for the county, and upon the hearing the appellants were convicted as above stated.

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16. Upon the hearing of the appeal evidence was given shewing the situation of the respective pit shafts to be as described in paragraphs 4, 5, 6, 7 and 8, the accumulation of water in the one pit shaft, the rate of influx into the two other pit shafts, and that save for a period of a few days during which they were withdrawn, the men continued at work in the headway. It appeared that on the 8th of June the respondent at an interview with the appellants discussed the possibility of erecting a dam in their pits to exclude the water, and the appellants were quite willing to erect such a dam, but it was ultimately thought by all parties that such an expedient would not be satisfactory, and the idea was abandoned. Upon receiving the notice above set forth, the appellants entered into negotiations with the owners and managers of the Bromford Colliery, and tried to make arrangements for the raising of the water from their pit shaft, and so reducing and removing the accumulation of water there. Owing to the pit shaft and machinery in the Bromford Colliery being out of repair, this could not be done without executing considerable works which would occupy some months.

17. The appellants then entered into negotiations with Mr. W. H. Dawes for permission for the appellants to pump the water out of the pit shaft at Littleton Hall Colliery, but were refused, upon which negotiations for a purchase of the Littleton Hall pit shafts by the appellants were commenced, and on the 5th of September last Mr. Dawes entered into an agreement for the sale to them of the colliery.

18. On the 10th of September the appellants first began to draw out the water from the pit shafts at Littleton Hall Colliery, and have from that time reduced the accumulation of water complained of.

19. It was proved or admitted that the appellants in acting as above stated had taken and were prosecuting practicable measures for removing the accumulation of water.

20. It was contended on behalf of the appellants that the conviction must on any view of the facts be erroneous, as no offence under the Act could have been committed till long after the 12th of June. The Sessions, however, heard the appeal on the merits, and quashed the conviction.

21. The Sessions found as follows:—

"That there was danger to workmen from a serious and increasing accumulation of water.

"That the appellants had used reasonable diligence to comply with the inspector's notice so far as taking means to reduce the water, but nothing was done down to the 10th of September towards reducing the water.

"That up to that time 723 tons of water in each twenty-four hours came into the pit, and notwithstanding the request of the inspector the men were continued at their work."

The question for the opinion of the Court is whether the order of sessions quashing the conviction was right.

Gorst, Q.C. (*C. Bowen*, with him), for the respondent. The objections relied on by the appellants only went to shew that the justices ought in the first instance to have granted an adjournment. But the appellants ought in the meantime to have removed their men from this pit, and their failure to remove them is enough to warrant the conviction. [He was then stopped.]

Bosanquet (*Darling*, with him), for the appellants. The justices had no jurisdiction to convict under s. 46. This section does not apply where the source of danger is beyond the boundary of the defendant's mine. As to the failure to withdraw the men from the pit, it can only be dealt with under s. 51, and is not the subject of proceedings under s. 46.

[LUSH, J. Has the mineowner, upon receipt of the notice under s. 46, any remedy except an application to a Secretary of State?]

There is no such limitation in a case like the present, where the section has no application. The notice under the section cannot extend to the removal of an accumulation of water in another mine, and it does not direct that in such a case the mineowner shall remove his men.

Gorst, Q.C., in reply. Sect. 46 applies to the present case. The notice was simply to "remedy" the matter, and this the appellants could have done by removing their men. What they were called upon to remedy was not the danger to the mine, but the

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danger to the workmen in the mine. It is true that the notice did not specifically direct the removal of the men, but this was not necessary. The notice should simply call on the mineowner to remedy the matter, leaving him to please himself as to the manner in which he does it.

COCKBURN, C.J. I most earnestly wish that I could adopt the view of s. 46 which my Brother Lush has suggested during the argument, but the section as I read it contemplates a danger which it is in the power of the mineowner to remedy, quite irrespective of his power of removing the workmen in the mine. The 46th section provides that, "If any inspector finds any mine to which this Act applies or any part thereof, or any matter, thing, or practice in or connected with any such mine to be dangerous or defective so as, in his opinion, to threaten or tend to the bodily injury of any person, such inspector may give notice in writing thereof to the owner, agent, or manager of the mine, and shall state in such notice the particulars in which he considers such mine or any part thereof, or any matter, thing, or practice to be dangerous or defective, and require the same to be remedied." It does not say that meanwhile the men shall be withdrawn from the danger which the inspector finds to exist, nor does it say that if the remedy is incapable of application the alternative shall be the withdrawal of the men. Nothing of the sort is said directly or indirectly, and it evidently pre-supposes a state of things which it is in the power of the mineowner to remedy. It can never be supposed that a man shall be liable to a penalty because he fails to do something upon his neighbour's property, having no power by common law or statute to do so. If a man's mine is in danger from some defect existing upon his neighbour's land, he cannot enter upon that land in order to remedy that defect. Therefore, there was neither morally nor legally an obligation on the defendant (the mineowner) in this case to go upon his neighbour's land in order to remove the accumulation of water. The case does not come within the 46th section at all. First, because the section has reference simply to the condition of the mine, and the remedy intended is not the removal of the men, but to render the condition of the mine such as to get rid of the danger. Secondly, the remedy

is to be found under the 6th sub-sect. of s. 51, and I regret that it is to be found there only, and for this reason, that there the inspector has no authority to interfere at all. I wish the 46th section had gone further, and given the inspector authority to give notice to the mineowner to withdraw his men as the alternative of removing the danger. I have every disposition to read it in that way; but I do not think that we are obliged to add to legislation additional penalties. The conviction must therefore be quashed.

MELLOR, J. I am of the same opinion. I think, reading the 46th section in connection with the 51st and 52nd, that it applies to matters in the mines affecting the actual mine itself. The general scope and object of the Act is to prevent danger to human life, and one would read any section with that view as far as it is capable of being read; but I think that when you look at the words you cannot apply them in the way for which Mr. Gorst contends. The words are, "If in any respect which is not provided against by an express provision of this Act or by any special rule." Now, I have some little difficulty as to the words "any special rule," but, looking at s. 52, which states what rules are special rules, and what may be done, I find this: "There shall be established in every mine to which this Act applies, such rules (referred to in this Act as special rules) for the conduct and guidance of the persons acting in the management of such mine, or employed in or about the same as under the particular state and circumstances of such mine, may appear best calculated to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in or about the mine, and such special rules, when established, shall be signed by the inspector who is inspector of the district at the time such rules are established, and shall be observed in and about every such mine in the same manner as if they were enacted in this Act." Now, therefore, we are to look and see, if it is not provided in any express provision of the Act itself, or by any special rule in connection with it, what is to be done when anything is found calculated to produce dangerous accidents. Sect. 46 is as follows: "If any inspector find any mine to which this Act applies, or any part thereof, or any matter, thing, or practice, in or connected with any

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such mine to be dangerous or defective, so as in his opinion to threaten or tend to the bodily injury of any person, such inspector may give notice in writing thereof to the owner, agent, or manager of the mine, and shall state in such notice the particulars in which he considers such mine or any part thereof, or any matter, thing, or practice to be dangerous or defective, and require the same to be remedied." Here the inspector does affect to act under s. 46. He does give a notice in which he specifies the matters which he considers pregnant with danger, and in this case it is danger resulting from a great accumulation of water in an adjoining mine. Now what is his notice? It is to remedy that. It is perfectly clear that the owner of the mine had no means to remedy it. It may be said that leaving the men in the mine was a source of danger which ought to have been avoided. I agree with my Lord, I desire that the section should be more explicit, and more full of authority in that respect; but I must say that it seems intended to be confined to matters capable of remedy, physical or disciplinary, which may be remedied by the owner or agent of the mine. If the owner or agent objects, the negligence is to be reported to the Secretary of State, and is to be dealt with by arbitration within twenty days after the expiration of the objection. If he objects either to remedy the matter complained of, or if he does not proceed to arbitration, then he becomes liable to the fines. Now the reference to arbitration tends to narrow the inquiry to matters which are within the competency of the manager or owner of the mine to remedy, but the justices dealt with this case as if the whole proceeding were warranted by the section, and they convicted upon the notion that the defendants had disobeyed the notice. Now, if I am right it is clear that the conviction must fail, because the notice refers to something which it is out of the power of the owner of the mine to remedy, and that is also shewn very much by that part of the section which provides that if the Court are satisfied that the owner, agent, or manager has taken active measures for complying with the notice or award, but has not with reasonable diligence been able to complete the work in the manner which may be considered necessary to remove the danger, they may adjourn the proceedings to allow him time to finish the work, and in that case no penalty will

attach. No doubt that was in the mind of the Sessions when the matter came before them. If I am right in supposing that this only applies to cases which can be remedied by the owner, no doubt the conviction was properly quashed. There is no provision for the withdrawing compulsorily of the men, but the Act of Parliament does not leave the men unprotected, and although I think that the 6th sub-sect. of s. 51 is mainly directed to gas and things of an inflammable character which arise within the mine, yet still it goes further than that, for it says, "If at any time it is found by the person for the time being in charge of the mine or any part thereof that by reason of noxious gas prevailing in such mine or such part thereof *or of any cause whatever* the mine or the said part is dangerous, every workman shall be withdrawn from the mine or such part thereof as is so found dangerous." And then there is a provision to call in a competent person to determine that, and to see whether any existing cause of danger remains before the men are re-admitted into the mine. So long as there is danger within sub-s. 6, arising from any cause whatever, although the owner cannot remedy it, he must not work the mine. That really explains the effect of the two provisions, and I come therefore to the conclusion that upon this case the justices were wrong, and that the Sessions were right in quashing the conviction.

LUSH, J. I am sorry that I am unable to agree with the view taken by my Lord and my Brother Mellor of the 46th section. Two objections are raised against the application of this section. The first is that its operation is excluded by the 6th sub-section of the general rules, because that section says that, "If at any time it is found by the person for the time being in charge of the mine or any part thereof that by reason of noxious gas prevailing in such mine, or such part thereof, or of any cause whatever, the mine or the said part is dangerous, every workman shall be withdrawn from the mine or such part thereof as is so found dangerous." This undoubtedly makes it the duty of the manager of the mines, whether any notice is given him or not, if his mine is dangerous by reason of gas or from any other cause, to withdraw the workmen immediately. Now, there seems to be no doubt that there was

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danger to the lives of the men in this mine from the proximity of the accumulated water in the shaft of an adjoining mine. The 46th section also supposes that there is danger to the lives of workmen from some cause or other, and that which gives the inspector jurisdiction to give the notice is that the mine is dangerous from some cause or other to the lives of the persons in it. There may be a source of danger, such as the present, which may not have been discovered by the owner, but known to the inspector, which makes it his duty to give the notice under the 46th section; but whether he knows it or not, the jurisdiction of the inspector remains just the same. The 46th section says:—"If in any respect (which is not provided against by any express provision of this Act or by any special rule)"—such dangers exist. Both, therefore, suppose a state of danger to the persons working in the mine. Now the second objection is that the words "not provided against by any express provision of the Act" exclude the protection of the 6th sub-section, which I have read. I do not see that at all. There are many provisions of this Act by way of precaution. For example, there is a provision requiring that there shall be two shafts, double shafts allowing safe ingress and egress, that there shall be ventilation and various other things which are precautions against the occurrence of danger. These I take to be what are meant by the express provisions of the Act —that is, any source of danger which is not provided for by any express provisions of that kind—any precaution intended to prevent the occurrence of such dangers, or any special rule. There are special rules which are to prevent the recurrence of danger. There is nothing about any general rule as in the 6th sub-section. Therefore I think that it gives the jurisdiction to the inspector over cases other than described in the 6th sub-section. Now as to the second objection that the 46th section has no appli-tion where the water is accumulated in an adjoining mine, I may say that here the matter which caused the danger is the existence of a quantity of water belonging to an adjoining mine over which the owner of this mine had no control. I agree that if he had not the means of removing the matter by withdrawing that water or building up any obstruction that he would not be liable to this penalty. No doubt it contemplates a matter capable of being

removed, but I do not think that it leaves it to the individual to treat the matter as if no notice had been given, and to lie by because he thinks he has not the means of getting access to his neighbour's property. I think that the Act intended that it should not be left to him to say that, but if he has not the means of removing the matter that he ought to give the Secretary of State, or the person who acts under him, the opportunity of ascertaining whether the mineowner can or cannot remedy the matter. Now the Act says upon the discovery of danger by the inspector he may give such notice in writing to the owner or manager of the mine, and shall state the particular in which he considers such mine, or any part thereof, to be dangerous or defective, and require the same to be remedied; and unless the same be forthwith remedied the inspector shall also report the same to a Secretary of State. What then is the duty of the owner when he receives that notice? "If the owner, agent, or manager of the mine objects to remedy the matter complained of in the notice, he may within twenty days after the receipt of such notice, send his objection in writing, stating the grounds thereof to a Secretary of State." Now, the object seems not to require him to do what he is not able to do, but to make him comply with the notice. That is the fair meaning. The section goes on to say:—"If the owner fail to comply either with the requisition of the notice where no objection is sent within the time aforesaid, or with the award made on arbitration within twenty days after the expiration of the time for objection or the time for making of the award (as the case may be) he shall be guilty of an offence against this Act, and the notice and award shall respectively be deemed to be written notice of such offence." Now it appears to me, therefore, whether he has the means of remedying the matter or not, his duty is to submit to the authority and to state the grounds of his objection to remedy the matter within twenty days to the Secretary of State, so that the Secretary of State may determine whether or not he is capable of remedying the matter. Then the section further provides for the case in which he is unable to complete the matter within the specified time, "provided that the Court, if satisfied that the owner, agent, or manager has taken active measures for complying with the notice or award, but has not with reasonable diligence been

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able to complete the works, may adjourn any proceedings taken before them for punishing such offence; and if the works are completed within a reasonable time, no penalty shall be inflicted." Therefore the conclusion which I come to is that the jurisdiction of the inspector to give this notice where danger exists in a mine from the proximity of water in another mine, as in the case before us, is not excluded by the 6th sub-section of s. 51 making it the duty of the owner of the mine to remove his workmen. Though section 46 contemplates undoubtedly matters that are capable of being remedied by the mineowner, nevertheless the mineowner may commit an offence against this Act by not taking notice to appear within twenty days, and stating the grounds of his objection, so that the Secretary of State may determine whether he has or has not the means to comply with that Act. I cannot think that the Act intended to leave it to the owner to choose whether he would obey the notice or not. His duty upon receipt of such a notice is to take steps to comply with it, or to go to the Secretary of State if he objects.

Judgment for the appellants.

Solicitors for prosecution: *Solicitors to the Treasury.*

Solicitor for defendants: *E. Doyle, for H. Jackson, West Bromwich.*

May 27; *July* 2.

BUCK *v.* ROBSON AND ANOTHER.

Stamp—Order for Payment of Money—Assignment of Debt—Evidence.

10 Ch D 620
M 1917-27 W 361

T. contracted with J. to build for him a steam launch for the sum of 80*l.*, the price to be paid when the boat should be completed and delivered. T., after receiving 40*l.* on account, addressed a letter to J. as follows: "I hereby assign to Messrs. R. & Son the sum of 40*l.* now due or that may hereafter become due in respect of the steam launch which I am building for you":—

Held, that T.'s letter was not an order for the payment of money, but an assignment of a debt, and might be given in evidence on payment of the proper stamp duty and penalty.

INTERPLEADER ISSUE to try the right to a sum of 40*l.*, the balance of a debt due by one J. Jopling to T. Tate.

At the trial before Hawkins, J., at the Durham Spring

Assizes 1878, there was a verdict for the plaintiff for the amount claimed.

A rule nisi having been obtained, calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had on the ground of misdirection,

May 27. *McClymont* shewed cause.
Lofthouse supported the rule.

Cur. adv. vult.

The facts and arguments sufficiently appear in the judgment.

July 2. The judgment of the Court (Cockburn, C.J., and Mellor, J.) was delivered by

COCKBURN, C.J. This was an interpleader issue which came on for trial before Hawkins, J. The subject-matter of the contest being a debt of 40*l.* due as part of the price of a steam-launch, from one Jopling to Tate, a shipbuilder, whose estate had gone into liquidation, and which was claimed on the one hand by the plaintiff, Buck, as trustee of the estate, on behalf of the creditors, and on the other, by the defendants Robson & Son, under an assignment of this debt made to them by Tate prior to his going into liquidation, but the validity of which was disputed on the part of the creditors. Both parties having instituted proceedings against Jopling, the latter interpleaded and brought the 40*l.*, the amount of the debt, into court to abide the result.

The facts were as follows: Tate, the insolvent, had entered into a contract with Jopling to build for him a steam-launch for the sum of 80*l.*, the price to be paid when the boat should be completed and delivered. But though by the contract no part of the price was payable in advance, Jopling, during the progress of the work, advanced to Tate 40*l.* on account. In this state of things Tate being indebted to Robson & Son, who are timber merchants, for timber supplied to him, agreed to make over to them the further 40*l.*, which would become due to him from Jopling on the completion of the contract; in furtherance of which he addressed a letter to Jopling of the 31st of July, 1877, in these terms: "Dear Sir, I hereby assign to Messrs. Robson & Son, boat builders, Sunderland, the sum of 40*l.*, or any

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other sum now due, or that may hereafter become due in respect of the steam-launch which I am building for you. I will thank you to hold the same at their disposal, and their receipt for the amount will be a full and sufficient discharge." This letter having been forwarded by Robsons to Jopling, the latter replied as follows: "I am in receipt of your letter, and Mr. Tate's order to pay you the sum of 40*l.* on account of a boat he is building for me. This shall have my best attention when it is finished to my satisfaction." Before the boat was finished Tate, who had previously been in difficulties went into liquidation, and the plaintiff Buck was appointed trustee on behalf of his creditors. Jopling for whom the launch had been built, objected to the material with which a portion of the vessel had been constructed, but in order that it might not fall into the hands of the trustee, he with the acquiescence of Tate took possession of it, and in order to obtain possession paid a sum of 9*l.* 11*s.* to satisfy a distress for rent which had been put in by the landlord of Tate's premises, and under which the launch had been seized.

We are not in the present case embarrassed by having to consider how far these circumstances might have afforded to Jopling good ground for treating the assignment of the debt otherwise due from him to Tate on the completion of the launch as subject to any counter-claim on his part in respect of these particulars. Jopling having interpleaded and paid the amount into court, is not before us so as to be able to insist on the inefficacy, entire or partial, of the assignment of the debt, on the ground of any counter-claim which he might have had against Tate. We have to deal with the question only as between the parties to the issue. On the trial the claim of the creditors' trustee being met by the claim of Messrs. Robson, founded on the assignment of the debt as made by the letter of the 31st of July, an objection was taken to the admissibility of the document, on the ground that it was in effect an order for the payment of money, and as such inadmissible for want of a stamp, the defect being one which was not curable under the Stamp Act by the payment of the duty and the penalty. On the other hand it was contended that the document in question was not an order to pay money, but an assignment of a debt to accrue due, which under the statute could be stamped ex post

facto on payment of the duty and penalty. The learned judge ruled that the document was in effect an order for the payment of money, and therefore being unstamped altogether inadmissible, and he would have given judgment for the plaintiff, but the counsel for the plaintiff admitting that if the document was an assignment of the 40*l.* accruing due from Jopling, it would on payment of the stamp duty and penalty entitle the defendant to the verdict, and consenting, if such should be the view of the Court, to an order barring the plaintiff's claim rather than that the parties should be put to the expense of a new trial, the matter came before us in point of form on a motion for a new trial, but practically with a view to a binding decision between the parties.

We are of opinion that the contention of the defendant's counsel is right, and that the letter in question was in effect not an order for the payment of money, but the assignment of a debt. At the time of the trial of this issue it had been held by Vice-Chancellor Bacon, in a case of *Ex parte Shellard in re Adams* (1), that such a document was an order for the payment of money, and as such inadmissible, if wanting a stamp. In that case two contractors named Adams and Kirby, who were erecting some gasworks for the Bristol United Gaslight Company, addressed the company as follows: "We shall be obliged by your paying Mr. Joseph Shellard the sum of 200*l.* out of money payable to us on the completion of our contract for buildings now being built by us for your company, and his receipt shall be a discharge of the same."

There being in substance no difference between this letter and the one in the case before us, we should have been bound equally with the learned judge on the trial of this issue by the authority of this decision as that of a Court of co-ordinate jurisdiction. But concurrently with the present litigation a case of *Brice* v. *Bannister* (2), which turned on the effect of a precisely similar document was pending in the Court of Appeal; and judgment therein having been delivered just before the present case was argued before us, we were of course desirous of seeing a report of the judgment before we gave judgment in the case before us. The report of that case has not yet as been published, but by the courtesy

(1) Law Rep. 17 Eq. 109. (2) Since reported. 3 Q. B. D. 569.

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of the learned reporters we have been furnished with a copy of the forthcoming report.

The decision of the Court of Appeal appears to us to warrant a different view from that taken by Bacon, V.C. In *Brice* v. *Bannister* (1) a contract had been entered into between the defendant Bannister and one Gough, a shipbuilder, under which the latter was to build a vessel for the defendant, the price to be paid by certain instalments corresponding with certain stages in the construction of the vessel, the last on its final completion. The last stage having been entered on, the builder being indebted to the plaintiff and pressed by him for payment, delivered to him a letter addressed to the defendant in these terms:—"I do hereby order, authorize, and request you to pay to Mr. William Brice, solicitor, Bridgewater, the sum of 100*l.* out of moneys due or to become due from you to me, and his receipt for same shall be a good discharge. Dated 27th of October, 1876."

This letter was duly communicated to Bannister, but he declined to be bound by it; and the shipbuilder, being unable to complete the vessel from want of funds, the defendant advanced him sums of money for the purpose amounting to more than the 100*l.*, the sum referred to in Gough's letter as to be paid to the plaintiff. An action having been brought by the plaintiff Brice against Bannister to recover the 100*l.*, the defendant, by way of counterclaim, sought to set off the amount of the advances made by him to the builder to enable him to complete the vessel. But it was held by Cotton and Bramwell, L.JJ., Brett, L.J., dissenting, that by the effect of the document of the 27th of October an absolute assignment of the accruing debt was made to the plaintiff, which could not be affected by any payments afterwards made to the assignor by the debtor. As we read this judgment it leaves the question open how far it may be competent to a debtor whose debt accruing due on the completion of a contract has been thus assigned to a third party to set off as against the assignee counterclaims arising out of the contract itself, as for bad materials, bad workmanship, and the like, as he might have done against the assignor himself, his proper creditor. It is one thing to say that where a creditor assigns to a third party a debt accruing due the

(1) 3 Q. B. D. 569.

right of the assignee if the debt actually becomes due cannot be derogated from by any independent liabilities of the creditor to the debtor subsequently arising—a very different thing to say that liabilities of the creditor to the debtor arising out of the contract before the debt becomes due, may not be taken into account. But, as has already been pointed out, the debtor not being before us, no such question arises in the present case. The importance of the judgment arises from its appearing that an order from a creditor to his debtor to pay to a third party was treated by the Court of Appeal as an assignment, and not as an order for the payment of money.

It is true that the question as to the distinction between these two classes of instruments, more especially with reference to the question of stamp duty, did not directly arise in *Brice* v. *Bannister* (1) as in the present case. But it appears to have been assumed on all hands that, subject to the disputed question as to how far the defendant was entitled to set off the advances subsequently made by him to the assignor, the effect of the instrument was as between the builder and the defendant to all intents and purposes an assignment of the debt. For had the direction to the defendant to pay to the plaintiff amounted to no more than what is technically termed an order for the payment of money, the liability of the drawee would have been, not to the payee but to the drawer, and the claim of the latter would have been liable to be met by any diminution of the fund drawn upon through payments made to or on account of the drawer subsequently to the date of the order. In our acceptation of the term an order for the payment of money presupposes moneys of the drawer in the hands of the party to whom the order is addressed, held on the terms of applying such moneys as directed by the order of the party entitled to them. No such obligation arises out of the ordinary contract of sale. If a purchaser buys goods of a manufacturer or a tradesman, he undertakes to pay the price to the seller, not to a third party, who is a stranger to the contract, nor will the mere order or direction of the seller to pay to a third party impose any such obligation upon him; it is only when and because the right of the seller to the price has been transferred to the third

(1) 3 Q. B. D. 569.

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party by an effectual assignment that the assignee becomes entitled as of right to the payment. The decision of the Court of Appeal in *Brice* v. *Bannister* (1) in favour of the plaintiff on an order similar in its terms to those of the document in the case before us, implies that the Court looked upon the document, not as an order for the payment of money, but as an assignment pro tanto of the debt due from the defendant to the builder. Being ourselves decidedly of opinion that an order from a creditor to his debtor under an ordinary contract for the price of goods, or for work and labour, or the like, to pay to a third party can confer a right on the latter only so far as it operates as an assignment of the debt, we feel ourselves warranted, on the authority of *Brice* v. *Bannister* (1), in acting on that view, notwithstanding the decision in *Ex parte Shellard* (2), and in holding that the letter from Tate to Jopling was in effect an assignment, and not an order for the payment of money, and consequently that it should have been allowed to be given in evidence on payment of the duty and penalty. In point of form we can only direct that the rule shall be made absolute for a new trial, but we presume that in conformity with the arrangement come to at Nisi Prius, this will be equivalent to a judgment in favour of the defendants. Of course, the defendants can obtain this advantage only on the condition of paying the stamp duty and penalty, on the payment of which the document in question would have been admissible in evidence.

Rule absolute.

Solicitors for plaintiff: *Bell, Brodrick, & Gray, for Robinson, Sunderland.*

Solicitors for defendant: *Belfrage & Middleton, for Skinner, Sunderland.*

(1) 3 Q. B. D. 569. (2) Law Rep. 17 Eq. 109.

Applied. REX *v.* DUNSHEATH [1951] 1 K. B. 127

[IN THE COURT OF APPEAL.]

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May 2.

THE QUEEN ON THE PROSECUTION OF A. J. TILLYARD *v.* THE PRINCIPAL, FELLOWS, AND SCHOLARS OF HERTFORD COLLEGE IN THE UNIVERSITY OF OXFORD.

Mandamus—Fellowship—Visitor—Universities Tests Act, 1871 (34 *Vict. c.* 26) *—Endowment with Religious Test—Hertford College Act*, 1874 (37 *&* 38 *Vict. c.* 55).

By the Hertford College Act, 1874, Magdalen Hall in the University of Oxford was dissolved, Hertford College created, and the property of Magdalen Hall transferred to Hertford College. An endowment for a lay fellowship restricted to members of certain specified churches was afterwards accepted by Hertford College. T., who was not a member of any of the specified churches, tendered himself for examination as a candidate, and was informed that he might be examined if he desired it, but he must understand that he would not be elected even if he stood at the head of the list. T. did not present himself for examination and M., a duly qualified candidate, was elected after examination to the fellowship. After the election T. applied to the Queen's Bench Division for a mandamus :—

Held, overruling the decision of the Queen's Bench Division, first, that there was no refusal to examine T.: secondly, assuming that T. was refused examination, the office being full of a candidate properly qualified, a mandamus would not lie commanding the college to examine T. and to proceed to an election: and that T.'s remedy, if any, was by way of appeal to the visitor.

The operation of the Universities Tests Act, 1871 (34 Vict. c. 26) is confined to colleges subsisting before it was passed, and the Act does not prevent the creation in the universities of fresh colleges, the endowments of which are confined to the members of a particular religious community.

The University Tests Act, 1871, is not incorporated with the Hertford College Act, 1874, and s. 13 of the latter Act which provides "that nothing in this Act contained shall be construed to repeal any of the provisions of the Universities Tests Act, 1871," does not render Hertford College a "subsisting college" within the meaning of the former statute.

ERROR on the judgment of the Queen's Bench Division to a demurrer to a return to a mandamus directed to the principal, fellows, and scholars of Hertford College, Oxford, commanding them to examine the prosecutor as a candidate for a vacant fellowship in the college, and to proceed to the election of a fellow pursuant to the statutes of the college. (1)

The material facts as stated in the return, the arguments, and the cases cited, all appear in the judgment of the Court.

(1) 2 Q. B. D. 590.

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Dec. 14, 15, 16. *Herschell, Q.C.*, and *R. S. Wright*, for the prosecutor.

Sir H. S. Giffard, S.G., and *C. Bowen*, for the defendants.

Cur. adv. vult.

May 2. The judgment of the Court (Lord Coleridge, C.J., Baggallay, Bramwell, and Brett, L.JJ.) was delivered by

LORD COLERIDGE, C.J. This is an appeal from a judgment of the Queen's Bench, ordering a peremptory mandamus to issue to the principal, fellows, and scholars of Hertford College in the University of Oxford, commanding them, by the principal and fellows, to examine Alfred Isaac Tillyard on such subjects as the governing body shall determine, as a candidate for a vacant fellowship, the election for which was advertised to be held on the 2nd of December, 1875; and to proceed to the election of a fellow pursuant to the statutes of the college. The argument here and below took place on demurrer to the return; and it has been admitted that the return of the college states the facts contained in it fully and frankly, so that we have the whole case before us. Grave questions, not only as to Hertford College, but affecting the Universities of Oxford, Cambridge, and Durham, have been raised and must be decided, whether we confine ourselves to the peculiar facts of this particular case, or consider the construction to be placed upon the University Tests Act, 1871, in regard to colleges created after the passing of that Act, or in regard to endowments first added after the passing of that Act to colleges subsisting when it passed.

The material facts are these:—

There is a distinction in the University of Oxford between colleges and halls. Colleges are corporations, with power to hold property, and with endowed fellowships belonging to them. Halls are not corporations, have not power to hold property, and have no endowed fellowships belonging to them.

There was a college in Oxford called Hertford College, which was put an end to by Act of Parliament in 1805. At that time there was near Magdalen College, and standing on ground belonging to that college, a hall, called Magdalen Hall. When Hertford

College was put an end to, its property, site, and buildings were conveyed by Act of Parliament to the chancellor, masters, and scholars of the University of Oxford in trust for the principal and other members of Magdalen Hall, to enable the hall to be removed to the site of Hertford College, and there to be carried on as a hall. The removal took place, and about 600*l.* a year (besides the buildings of the hall) were held by the university, partly for the benefit of the principal of the hall, partly for certain university scholars, who were obliged to reside in the hall as students. The University Tests Act (34 & 35 Vict. c. 20) passed into law in 1871, and Magdalen Hall was within the second section of that Act, a subsisting "college" in the university when it passed, and as such clearly within the scope of its provisions; so it remained till the year 1874. In that year the Hertford College Act (37 & 38 Vict. c. 55) passed into law. By the effect of its second section Magdalen Hall was dissolved, and Hertford College was created and incorporated. The corporation consisted of the former principal of Magdalen Hall, who is made principal of the new college and four other gentlemen, by name: the scholars who before the Act were scholars in Magdalen Hall, "and all persons who shall hereafter be duly appointed to be fellows and scholars respectively, of or in the college hereby created, and their respective successors as principal, fellows, and scholars respectively of or in the said college."

Thirty thousand pounds had been given by a munificent person (whom there is no need to name), and this sum is by the Act, together with the former property of Magdalen Hall, transferred to the new corporation "for the endowment of fellowships in the said body."

It is not necessary to consider whether it could be disputed, because in this case it is not disputed, that all this endowment is held subject to the University Tests Act, 1871, and that no religious test can be applied to the principal, and to such fellows and scholars of Hertford College as hold offices, the emolument of which proceeds therefrom. But since the creation and incorporation of the college by the Act of 1874, that is to say in 1875, a very large sum of money amounting to above 4800*l.* a year has been added to the endowment of the college, exclusive of the old Magdalen

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Hall property, and of the 30,000*l.* above mentioned. And arrangements have been made with the college, by which this additional endowment is to be further increased, so as to amount at last in the whole to above 8000*l.* a year. The whole of this additional endowment has been given to the college, with "the desire and intention" of the donor, expressed in his instrument of gift, that it "should be limited to members of the Church of England or Ireland, or of the Protestant Episcopal Churches of Scotland, the British Colonies and the United States of America." It is in respect of a fellowship founded in 1875, and endowed out of this latter and additional endowment, that the question before us has arisen. The fellowship in dispute became vacant by the marriage of the gentleman who held it, in October, 1875. Two fellowships had already been filled up by election in the year 1875, beyond which number, by the 22nd section of the Hertford College statutes, the college are not bound to fill up vacancies which occur within any one year. In the latter part of the year 1875, however, the college advertised that there would be an election to the fellowship now in dispute, and stated in the advertisement that candidates must be members of the Church of England or of Ireland, or of the Protestant Episcopal Churches of Scotland, the British Colonies, or the United States of America. The prosecutor thereupon by a formal notice to the college, intimated that he intended to contest the legality of the limitation above mentioned, and that he proposed to present himself "as a Nonconformist candidate" for the vacant fellowship.

To this notice the principal replied on behalf of the college, to the effect that the limitation mentioned in the advertisement would be adhered to. The subsequent proceedings, as much may turn upon the exact form of them, are best stated in the language of the return of the college.

On the 13th day of December, 1875, the said Alfred Isaac Tillyard called on the principal at the said college, and stated that he had called to make his application complete, and also to obtain a more definite reply to his question of the 9th day of December, and asked whether he could be admitted to an examination as a Nonconformist. He was informed by the principal that the election could only take place according to the advertisement. Thereupon the said Alfred Isaac Tillyard inquired if that was not tantamount to saying that he could not be admitted to the examination as a Nonconformist, and that it would of course

prevent his going in for the examination if he knew that he should not be elected. The said Alfred Isaac Tillyard was thereupon informed by the principal that he might be examined if he desired, but that he must understand that he would not be elected even if he stood at the head of the list.

The examination of candidates for the vacant fellowship began on Tuesday, the 14th of December, 1875. Save as aforesaid, the said Alfred Isaac Tillyard did not present nor tender himself at or for such examination, nor was he examined among the candidates. The said examination terminated on Friday, the 17th of December, 1875.

After the examination was over, on the 20th of December, the prosecutor again applied to be examined and elected.

On the 20th day of December the said Alfred Isaac Tillyard wrote to the Reverend Richard Michell, D.D., principal of the said college two letters, in the words and figures following respectively:—

The Avenue, Cambridge, December 20, 1875.

Sir,—May I respectfully trouble you once more to lay the inclosed letter before the governing body of Hertford College. It contains a request that I may be examined and elected as a Nonconformist to the fellowship you have advertised. I shall reach Oxford to-day, and any reply to the Mitre Hotel, High Street, will receive immediate attention.

Your most obedient servant,

To Rev. R. Michell, D.D. Alfred I. Tillyard.

The Avenue, Cambridge, December 20, 1875.

Gentlemen,—I am informed that you proceed to the election of a fellow to-morrow (21st inst.). I request that you will examine and elect me as a Nonconformist. I shall be present at Oxford for that purpose, and any communication addressed to the Mitre Hotel, High Street, shall receive immediate attention.

Your most obedient servant,

Alfred I. Tillyard.

To the governing body of Hertford College, Oxford.

On the 21st day of December, 1875, the Reverend Richard Michell, principal as aforesaid, wrote and sent to the said Alfred Isaac Tillyard a letter in the words and figures following:—

Hertford College, December 21, 1876.

Sir,—I am requested by the governing body of Hertford College to acknowledge the receipt of your letter of yesterday's date.

The examination of candidates for the vacant fellowship in this college began, according to the terms of our printed notice (a copy of which was sent to you on December 11), on December 14, and terminated on Friday last.

When you called upon me in the evening on Monday, December 13th, you declined to go in for the examination.

The governing body are therefore at a loss to understand on what grounds you now ask to be examined and still more to be elected.

I am, Sir, yours faithfully,

A. I. Tillyard, Esq. R. Michell.

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And on the 21st of December Mr. Maude, a duly qualified candidate, was elected after the examination to the vacant fellowship. And the college contend that as the fellowship is full of a duly qualified candidate, that fact is alone and of itself an answer to the mandamus.

It will presently appear that we do not shrink from expressing an opinion upon the larger questions which have been argued before us, but we must say that the particular facts above detailed as to the application of the prosecutor and the election to the fellowship do appear to us to afford an answer to this writ at the suit of the prosecutor. And we add in consequence of what was said in the Court below, that we can see no reason in morals or in honour, why if the particular facts of the case afford an answer, the college should hesitate to rely upon them. A generous benefactor, having given 30,000*l.* without conditions to the college, has given, and is in course of giving, an additional sum equal to a large fortune, not as a so-called munificent testator, when he can make no further use of it himself, but in his own lifetime, and out of means which he might lawfully spend upon himself and his pleasures. This large sum the college has received at his hands upon certain conditions, which it is plain they did not think illegal, and which were certainly not in any degree in themselves disgraceful or immoral. The prosecutor who must certainly be aware that the donor, who is still living, did not wish to extend his bounty to him, claims to share it, or to try to share it, in spite of the donor's wish; and why, under these circumstances the college should not hold the prosecutor to his strictest legal rights, or refrain from availing themselves of any legal answer to a claim so purely legal, we are entirely unable to comprehend.

It may be further observed, that not only is this an objection which the college were justified in taking in defence of the gentleman who was elected to the fellowship, and who is admitted to have been in himself a perfectly fit and proper person to be elected; but that the objection, rightly considered, goes to shew that the courts of law have no jurisdiction over that which is really the question between the parties. For if the prosecutor had been examined, and had passed the best examination, and the college nevertheless had elected Mr. Maude in preference,

because of his religious opinions, it is plain that the prosecutor could not have successfully applied to a court of law to reverse the election. And this shews that by withdrawing from the examination, and then complaining that he was refused examination "as a candidate," he is bringing, or attempting to bring, indirectly the decision of the question under the jurisdiction of a tribunal, which directly could exercise no such jurisdiction over it. If the result should be, that the matter is left to the judgment and conscience of the members of the college, it is a result, in which, subject to the observations we are about to make, we should acquiesce without reluctance.

Do, then, the circumstances accurately looked at (and for this reason the paragraphs of the answer containing them have been set forth in the words of the return) afford a legal answer? We think they do. It seems plain that the prosecutor here did not pursue a proper course. By the general law, and by the statutes of Hertford College (1) all that any one who desires to be elected can claim, at first, is to be examined in accordance with the 19th section. Whether the University Tests Act, 1871, applies or does not apply to this fellowship, is for this part of the argument immaterial; this, in any view, is the first claim which a man must make who is desirous to be elected. Passing an examination is indeed a condition precedent to election; but it does not follow, and the words of the statute are carefully framed to prevent its following, that superiority in the examination gives an absolute and unqualified title to be elected. The prosecutor apparently, from his letter of the 20th of December, 1875, assumed that it did; but this is a mistake.

Now the only thing, which, at the time he asked for it, he was entitled to ask for, was never refused him. Intellectual exami-

(1) Section 19: The governing body shall elect such persons to be fellows as, after examination in such subjects as the governing body shall with reference to each vacancy determine, the governing body shall deem to be the most deserving to be fellows of the college, and best qualified to promote its interests as a place of religion, learning and education; provided that if two-thirds of the total number of the governing body, other than the principal, at a meeting convened after notice at least thirty days before the day of election, shall, with the consent of the principal, determine to elect any person to be a fellow without examination, the governing body shall elect such person.

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nation he may have been entitled to ask for, and intellectual examination was not only not refused him, but was in terms offered him by the principal. I am not forgetting the terms in which that offer was made; it was, however, made in fact. But he never presented himself for this intellectual examination; he had notice of the time and place of it, and he voluntarily stayed away. This being the case, what is there to shew, nay, what kind of presumption is there, that, even on his own view of the statutes and of the law, he would have had a right to the fellowship? There is nothing. If we assume that the college are wrong in the view they take of the application to themselves of the University Tests Act, 1871, still the prosecutor is in no condition to avail himself of their mistake.

It is said, no doubt, and with truth, that he claimed to be examined and elected, in his own phrase, as a "Nonconformist candidate," and that as such the college refused to examine him. The phrase, to "examine as a candidate," may be open to exception; but probably the meaning which the prosecutor desires to convey is, that he was told that after he had been examined by the college, the college would not elect him, although he did best in the examination, because he was a Nonconformist. Let us assume that the reason given for the intention not to elect him, if he did best, was a reason not warranted by law. Still it seems that he must give some sort of reason for believing that otherwise, and independently of this wrong reason, he is entitled to what he asks for, or, in other words, that the wrong view of the law taken by the college is a wrong to him.

This is a proceeding to redress a personal grievance, and unless there is some sort of evidence that a personal grievance has been suffered, it is not our duty to correct by mandamus a theoretical mistake in law on the part of Hertford College, even if we thought they had made it.

Take a case strictly analogous, but free from the disturbing influence, which the question of doctrinal tests appears to exercise over many minds. Suppose the case of a candidate for a fellowship, of unquestioned intellectual eminence among his fellow candidates, but believed, wrongly if you please, to have some grave disqualification of another sort, social, moral, or religious,

brutality of manners, extreme profligacy, or open and avowed disbelief in the foundations of all religion, and that such a man were told that whatever examination he passed the college would not elect him; could such a man decline the examination, dispense with any proof of his independent fitness, and come for a mandamus to vacate the election of a perfectly fit person on the ground of proof, conclusive if you will, that there had been a total mistake as to the existence of his own supposed disqualification? Surely not. But the case of such a man is in principle really the case of the prosecutor.

Furthermore, it is, as we have said, quite plain, that if the prosecutor had passed the best intellectual examination the college were not bound ipso facto to elect him. If, indeed, a man could shew a good ground for believing, as it is quite possible he might, that he had passed the best examination, that he had no moral or social disqualification, but that the college had, nevertheless, refused to elect him from motives wrong, illegal, or corrupt, he would not be without a remedy; but his remedy would be, not mandamus, but appeal to the visitor. Not mandamus, because a court of law can deal only with the acts not the motives of the actors; and if the electors' acts were legal, as where a discretion is left to them, and they act within it, mandamus is inapplicable. It has been suggested that the power of the visitor would be also an inapplicable remedy, because it can be exercised only in respect of those who are already members of the college. For this proposition the case of *Rex and Reg.* v. *St. John's College, Oxford* (1), was cited in the argument. But when that case is looked at it will be seen that there is no decision of the Court, as reported in 4 Modern; and the language cited to us is the language of counsel. It is certainly true that Lord Holt is made to say in the report of the case in the volume which bears the name of his reports (2), that a visitor has no jurisdiction over a scholar till he is admitted. The case is distinguishable, for an ascertained and definite private right of property in the Mayor of Bristol had been there interfered with by the college. But, at any rate, the case stands alone and has not been followed, while there are cases directly in point, and of great weight, which shew

(1) 4 Mod. 368. (2) Holt, 437.

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that the authority of the visitor is as complete over admissions to fellowships as over amotion from or deprivation of them. Such is the case of *St. John's College, Cambridge* v. *Todington*. (1) The form of the proceeding was prohibition. The college sought to prohibit the Bishop of Ely from proceeding to hear, as visitor, an application against them at the suit of a rejected candidate. After long and repeated argument the rule was discharged; and in the elaborate judgment of Lord Mansfield he lays down the proposition in terms that the bishop, as visitor, was judge of such a complaint, and that his jurisdiction was "most evident." And with him entirely agreed Sir Thomas Denison and Sir Michael Foster. In the case of *Rex* v. *Warden of All Souls College, Oxford* (2), which was an application for a mandamus to the college at the suit of a rejected candidate, the very point is taken that though a motion and correction belong to the visitor, admission and refusal do not. But it is taken only to be overruled by the whole Court. In the case of *Ex parte Wrangham* (3), there was an appeal to the Lord Chancellor as visitor of Trinity Hall, Cambridge, on the part of a rejected candidate. Lord Loughborough heard and decided the appeal without question as to his jurisdiction on this point, though he seems to have doubted at that time whether the Lord Chancellor were the proper minister to exercise the visitatorial power of the Crown. In the case of *Rex* v. *Master and Fellows of St. Catharine's Hall, Cambridge* (4) there was an application to the King's Bench for a mandamus to the college to declare a particular fellowship vacant, and to proceed to a new election. Lord Kenyon refused the rule on the express ground that the Lord Chancellor was the visitor, and that the jurisdiction over such a matter was with the visitor, and not with the courts of law. It is useless to multiply cases after authorities such as these. It might be done, however, and I abstain from it only because the contention on the part of the prosecutor is new, and seems unfounded. Certainly, at one time of my life I was familiar with appeals to the visitors of colleges by rejected candidates to

(1) 1 Burr. 158; 1 Burn's Eccl. Law, ed. 1842, p. 463, from the Historical Collections of Rushworth, vol. ii. pp. 324–332.

(2) T. Jones, 174.

(3) 2 Ves. 609.

(4) 4 T. R. 233.

reverse the results of elections; and perhaps I may be forgiven for saying that the college of which I was a fellow was ordered, while I was one, by the visitor to admit, and did admit to a fellowship, a gentleman whom the college had rejected upon grounds which the visitor, the Bishop of Exeter, deemed insufficient, and against which the rejected candidate successfully appealed.

If from cases of admission and refusal, we turn to cases of amotion from fellowships, the books are really full of cases in which the Courts have refused to interfere, and have remitted the applicant to the visitor. It is true that in cases of this sort the applicant had been a member of the college, in the case before us, and in like cases, he desires to become one. But in neither class of case is he a member at the time of the application, and we are unable to see that the distinction in fact makes any difference in principle. There are cases no doubt of which *Reg.* v. *St. Peter's College, Cambridge* (1), is an example, where the question arising on a pure point of law, as a right to nominate entirely apart from the statutes, the college being indifferent, the machinery of mandamus has been used for the purpose of trying title, but such cases in no way interfere with the principle just laid down. There are cases also, no doubt, in which the Court has granted a rule when the existence of a visitor is left in doubt, in order to see upon the return whether they have jurisdiction or not.

It has been argued that in this case the appeal to the visitor would be nugatory, because the Chancellor of Oxford is the visitor appointed by the statutes, and he has already, under the same statutes, sanctioned the conditions of donation, which it is contended are illegal. If, however, the visitor have jurisdiction, and if the reasons given by Lord Mansfield, in *St. John's College, Cambridge* v. *Todington* (2), for confining college disputes to college tribunals, are, as we think they are, still strong and cogent, this is no argument; and it is, moreover, reasonably certain that the chancellor would hear the matter argued in a judicial spirit, uninfluenced by any previous opinion of his own, and probably with the assistance of some eminent lawyer as his assessor. In this respect also, therefore, we think that the prosecutor has not

(1) 9 L. J. (N.S.) Q. B. 321. (2) 1 Burr. 158.

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followed the proper course, and that the particular circumstances of this case are an answer to his application.

The further point has been made that the office is full, and that therefore if the writ goes the college cannot obey it. It has been answered that this would indeed be so if the office were the proper subject of a *quo warranto;* but that as it is not, it follows that mandamus lies. For that proposition no authority is cited in the Court below except *Reg.* v. *St. Martin's in the Fields* (1). But that decides no such proposition; it decides only that where an office, to which quo warranto applies, is full, mandamus will not be granted. The converse of that proposition is not necessarily implied in the decision of the Court, and the expressions of the judges in the cases of *Rex* v. *Mayor of Cambridge* (2); *Rex* v. *Corporation of Bedford Level* (3); and *Rex* v. *Churchwardens of St. Pancras* (4) (each of these cases decided with expressions of doubt and on their own particular circumstances) by no means warrant the unqualified proposition laid down in the Court below by my Brother Lush that "where quo warranto does not lie mandamus is the only remedy." Probably the expressions of Sir Hugh Hill in the case of *In re Barlow* (5) are a correcter statement of the law, "unless the Court can see clearly that there is another remedy equally convenient, beneficial, and effectual, the writ of mandamus will be granted, provided the circumstances are such in other respects as to warrant the granting of the writ." To the proposition thus limited we should without difficulty assent, but in this case the circumstances are not such as to warrant the granting of it.

On the point that the office is full, and that this is of itself an answer to the application for the mandamus, as an abstract point of law the cases and the dicta are conflicting. *Basset's Case* (6) is cited in Viner, Mandamus R. 13, for the proposition, which when looked at it hardly sustains, that it is no good return that the office is full; while on the other hand the judgments of Lord Macclesfield and Eyre, J., in *Sir Gilbert Heathcote's Case* as

(1) 17 Q. B. 149; S. C. 20 L. J. (Q.B.) 423.
(2) 4 Burr. 2008.
(3) 6 East. 356.
(4) 1 A. & E. 80.
(5) 30 L. J. (Q.B.) at p. 271.
(6) Sid. 286.

reported (1), seem to assume that mandamus will not be granted where an office is full of a candidate properly qualified. We should, however, agree with the Court below in their conclusion on this point if we agreed with their premises. If the election of Mr. Maude were absolutely null, if the election had been merely colourable, we should be prepared to hold that the circumstances of its having taken place in fact, and of the candidate being accidentally well qualified, might be disregarded; and, that as there had been in law no election, mandamus ought to go to compel the college to hold one. But this is not in our judgment the true view of the case. It is on all hands conceded that the Courts have no power to compel the election of a particular person, and that the discretion of the college, as to electing this candidate or that, is left by the statutes absolute. "Such persons as they shall deem to be most deserving to be fellows of the college and best qualified to promote its interests as a place of religion, learning, and education," are the words, which ascertain the duty. But this is not a legal duty, nor have the Courts the power to enforce it. It is a moral duty, to the discharge of which the conscience is bound, and which there is no reason to doubt has been discharged in the colleges of the universities since the passing of the University Tests Act, 1871, and in reference to its provisions with honour and integrity. But the election being thus discretionary, and no legal consequence of the result of the examination, the cases cited to us, in which it has been held that the exclusion of a qualified candidate (who, in certain events, would have had a legal right of election), makes the subsequent election null and void, have no application. And in this sense, and with these qualifications, we think that the office being full is another answer to this proceeding.

It has been said that this line of reasoning seems to shew that even the "subsisting" colleges, those to which in its terms the University Tests Act, 1871, applies, may evade its provisions with impunity, at least as regards any interference of the courts of law. They may; as other men may evade plain duties which bind in honour and in conscience, if they hold their peace and disregard clear moral obligation. It is not lightly to be supposed that

(1) 10 Mod. 48.

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bodies of educated men will unite in dishonourable and unconscientious courses; but if such things often happened, there can be no doubt that Parliament would not, as it ought not, to hesitate to turn a moral obligation disregarded into a legal one which could be enforced. That is no reason, however, why a court of law should do what Parliament has deliberately abstained from doing. We may refer with entire agreement to the instructive judgment of Lord Loughborough (1), in the case already cited, for strong reasons of sense and convenience, why we should not even desire to bring questions relating to college fellowships under the jurisdiction of courts of law. For these reasons, then, upon the facts of this particular case, we think there is no ground for issuing the mandamus. The prosecutor was not refused examination, he did not place himself in a condition to claim more of the college than the college had offered; if he had and if they had improperly refused him his wrong would be one corrigible by the visitor and not by the courts of law; and in the sense in which we have explained it the plenarty of the office is an answer to the writ.

Such are the reasons, apart from the broader questions, raised and decided in the Court below, which have led us to differ from the conclusion of the Court. But the case fairly raises those broader questions, and we proceed to give judgment on them. Besides the duty in not encouraging doubts on an important practical matter which we do not in any degree share, these questions are raised by the return, they were argued and decided in the Court below, they were elaborately argued before us, and if this case should go further it may be essential for the guidance of the college in this very election, that they should be decided.

The questions are two—

1. Does the University Tests Act, 1871, bind Hertford College proprio vigore? 2. Is Hertford College made subject to the University Tests Act, 1871, by the provisions of the Hertford College Act, 1874?

Upon the first point the judges below differed. My Brother Mellor held that the University Tests Act, 1871, did govern Hertford College proprio vigore; my Brother Lush held that it did not. On this point we agree with my Brother Lush. Hertford

(1) In *Ex parte Wrangham*, 2 Ves. 609.

College was not a subsisting college when the University Tests Act, 1871, passed; and it is to subsisting colleges in terms the 3rd section of the Act, and as far as the imposition of tests is concerned, the whole Act is carefully confined. It is said, indeed, by my Brother Mellor, that "it could never have been intended by parliament that the repeal of the restrictions, tests, and disabilities effected by the University Tests Act, 1871, should be limited to existing colleges and existing endowments." We are not, however, concerned with what parliament intended, but simply with what it has said in the statute. The statute is clear, and the parliamentary history of a statute is wisely inadmissible to explain it, if it is not; but in this case, if it could be referred to, it would appear beyond all controversy Parliamentum voluisse quod dicit lex.

We are clearly of opinion that the University Tests Act, 1871, does not of itself prevent the creation in the universities of fresh colleges, the endowment of which may be confined to the members of a particular religious community. It does not indeed appear to have been the intention of parliament that no endowments should be allowed to be created in colleges which might be founded after the passing of the University Tests Act, 1871, in favour of particular forms of religious belief. The Act provided that the wishes of founders expressed, speaking generally, centuries ago, should not now prevail in a state of things altogether different, which could not have been foreseen, and which might, possibly at least, have modified the expression of their wishes. But it was to "subsisting colleges" only that its operation was expressly confined. The statute, as we have said, is clear, and we are satisfied that in thus construing its language we are following its spirit, and effecting its real object.

In considering the second question it is important to bear in mind the particular circumstances of the creation of Hertford College, which in the earlier part of this judgment we have set out in detail. It is formed in part out of an institution which was a "subsisting college" within the meaning of the University Tests Act, 1871, and the buildings and endowments of that institution are part of the buildings and endowments of Hertford College. It is carefully provided by the 3rd and 4th sections of the Hertford

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College Act, 1874 (37 & 38 Vict. c. 55), that endowments belonging to, and holders of office in, the old institution shall remain, on being transferred to the new institution, subject to the same legislation which would have governed them if they had still belonged to, and held offices in, the old. To these endowments, therefore, and to the persons who held in the new college the emoluments which proceed from these endowments, the University Tests Act, 1871, undoubtedly applies. Such persons cannot be required in the words of the Act "to belong to any specified church, sect, or denomination." Furthermore as the college statutes and the Hertford College Act, 1874, do not either of them authorize in terms the imposition of any tests in respect of the 30,000*l.* which is mentioned in the preamble and dealt with in the second section of the Act, it is clear, at least at present, that no test could be imposed by the college in respect of offices endowed out of that sum without some alteration of the language both of the Act and of the statutes of the college. But the question before us does not arise as to any such office. It arises in respect of an office created and endowed after the passing both of the University Tests Act, 1871, and of the Hertford College Act, 1874, and it is contended that endowment and office are nevertheless both within the provisions of the latter Act, because the 13th clause of the Hertford College Act is in these terms: "Nothing in this Act contained shall be construed to repeal any of the provisions of the University Tests Act of 1871."

Now, first by the 5th section of the Hertford College Act, 1874, the college may "make such regulations, ordinances, and statutes for the election of the fellows thereof as to them shall seem meet," subject, it is very true, "to any Act for the time being in force for the government of the university or colleges therein;" that is to say, subject to the law. But we have said already that the University Tests Act, 1871, though no doubt prospective and for all time as to the university, is not prospective in regard of tests as to the colleges, except such colleges as were subsisting therein at the time of the passing of the Act.

The 3rd section of the University Tests Act, 1871, is in the clearest terms prospective in respect of any office, including fellowships, in any college subsisting at the time of its passing.

So that, while it leaves the matter open as to any possible future colleges, it prevents the application of any test to any endowment, present or future, in subsisting colleges. It therefore is not a statute subject to which this power of the college is to be exercised. The proviso in the 5th section of the Hertford College Act prevents in effect the exercise of this power in respect to old offices or old endowments; and the 6th section, though not directly applicable to this argument, has yet an important practical bearing on the question; as shewing that with regard to certain statutes the control of the Queen in Council, and the power to interpose by either House of Parliament, is carefully preserved.

But the 7th section is still more important. By it the college are empowered "from time to time to accept such gifts and endowments as may be made to them for the endowment, improvement, establishment, or maintenance of (inter alia) fellowships within the said college, and for any other lawful purpose, upon such terms and conditions as may with the sanction of the chancellor of the said university be agreed on between them and the respective donors." It is in respect of a fellowship established under the provisions of this clause, as to the endowment of which all the conditions of this clause have been complied with, that the question before us has arisen.

It is very probable that the clause was passed with the knowledge that what has happened was about to happen, and for the purpose of legalising the creation and endowment of this very fellowship. But whether this is so or not, it would be difficult to find apter words to describe the transaction, than the words of the clause, which college and donor alike have understood as authorizing them to transact it. It is said, however, that the 13th section makes the transaction nugatory and unlawful, incorporates the University Tests Act, 1871, with the Hertford College Act, 1874, makes the college a subsisting college within the University Tests Act, 1871, and prevents the reception by it, though otherwise on this view lawful, of any endowment confined to the members of any specified church, sect, or denomination. This would be, as it seems to us, to put an altogether unreasonable and strained construction on a section expressed in the language of the 13th section

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here. It is a complete and sufficient answer to say that as the new college and the new offices are not and never were subject to the University Tests Act, 1871, none of the clauses of the Hertford College Act, 1874, are, according to the interpretation we have put upon them, construed so as to conflict with the 13th section. But it is also true that there is enough in the history of the foundation of Hertford College, and the incorporation into it of the old endowments and old offices belonging to Magdalen Hall, to explain the general saving of existing rights effected by the words before us. The earlier sections of the Hertford College Act, 1874, had specially dealt with these matters, and the last section may have been well added to secure the important objects dealt with in those sections; to ascertain their meaning, if it was obscure; to effect their object, if the language of the sections themselves had left it doubtful; and to provide that such parts of the new institution as had been subject to the old law should so remain, notwithstanding their forming part of a whole which, as a whole, was not so subject. Had it been intended to incorporate the University Tests Act, 1871, with the Hertford College Act, 1874, a sort of incorporation of which the statute book affords countless examples, there are words familiar to us all and in common use which might have been, and which we think it is fair to say would certainly have been, used. And no example was given us in which such an incorporation of one statute with another had been held to be the effect of such language as this. On this point, therefore, we differ from the Court below, and are of opinion that the University Tests Act, 1871, does not affect this fellowship, through the Hertford College Act, 1874, any more than it does by its own strength.

For all these reasons we are of opinion that the return of the college in this case is good, and that the judgment of the Court below must be reversed.

Judgment reversed.

Solicitors for prosecution: *Woollacott & Leonard.*
Solicitors for defendants: *Markby, Tarry, & Stewart.*

[IN THE COURT OF APPEAL.]

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Feb. 7.

MEGGY *v.* THE IMPERIAL DISCOUNT COMPANY, LIMITED.

Liquidation—Reputed Ownership—Laches—Trustee in Liquidation suffering Insolvent to remain in Possession—Certificate of Discharge.

16 Ch D 510

The plaintiff was appointed trustee under a liquidation commenced upon the joint petition of B. and S., partners in trade.: B. had separate creditors, and his separate assets consisted of furniture in his dwelling-house; no resolution was ever made for closing the first liquidation, nor was any certificate of discharge ever granted by the separate creditors of B., but a certificate of discharge had been granted by the joint creditors. The plaintiff, as an act of indulgence towards B., allowed him to remain in possession of the furniture for some years, and at last B. mortgaged it, together with other furniture subsequently acquired, to the defendants, to secure the sum of 500*l.* The defendants took possession of the furniture, and B. afterwards presented a second petition for liquidation. The furniture having been sold, the plaintiff sued to recover the proceeds. The trustee under the second liquidation disclaimed all interest in the furniture:—

Held, that the plaintiff was entitled to the proceeds of the sale: for, first, even if the furniture had vested in the trustee under the second liquidation pursuant to the Bankruptcy Act, 1869, s. 15, sub-s. 5, he alone, and not the defendants, could enforce the title created in him by that enactment; secondly, no laches could be imputed to the plaintiff as trustee, inducing the defendants to lend money to B. under the belief that the furniture was his own; and, thirdly, the certificate of discharge granted by the joint creditors to the partners did not set B. free from his separate liabilities.

THIS action was tried before Lush, J., and the question in dispute between the parties was, whether the plaintiff, as trustee under the liquidation of a person named Beverley, was entitled to the proceeds of the sale of certain furniture, which had been seized by the defendants.

The facts are stated in the judgment delivered by Lush, J., and it is only necessary to add that the trustee under the second liquidation of Beverley disclaimed all interest in the fund arising upon the sale of the furniture.

Holl, Q.C., and *McLeod Fullarton*, for the plaintiff.

Day, Q.C., *Lumley Smith*, and *Hardcastle*, for the defendants.

1877. Dec. 7. Judgment was delivered by

LUSH, J. The plaintiff is the trustee under a liquidation arrangement obtained upon the joint petition of Beverley and

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Sluman, who were partners in trade. There were separate creditors as well as joint creditors, and separate as well as joint assets; the separate assets of Beverley consisted of furniture in his dwelling-house; his separate creditors appointed a committee of inspection, and they, as an act of indulgence to Beverley, instructed the plaintiff, as trustee, not to take any steps for realising the furniture until he received further orders from them. This occurred towards the end of the year 1872. No further orders were ever given, and the insolvent continued in possession of the furniture until the 21st of January, 1876, when he mortgaged it, together with other furniture which he had acquired subsequently to his petition, to the defendants for a sum of 500*l*. He afterwards filed another petition for liquidation. This proceeding coming to the notice of the plaintiff, he put in his claim to the furniture, and then found that the defendants had already, and before the second liquidation, taken possession under their bill of sale. No resolution had ever been made for closing the liquidation, nor was any order of discharge ever given by the separate creditors; but an order of discharge had been given by the joint creditors before the purchase of the after-acquired property.

Upon this state of facts two questions arose; first, whether the plaintiff, the trustee under the liquidation, had not by lying by and allowing the insolvent to remain in possession of the furniture as the apparent owner, forfeited the right to claim the property as against the holders of the bill of sale; and, secondly, if not, whether the order of discharge did not operate as a discharge from his separate as well as from the joint debts, in which case the after-acquired property would be his, and would consequently pass to the defendants by virtue of the bill of sale. Several authorities were cited, which I have consulted, and I have come to a conclusion against the defendants upon both points. If the trustee had authorized the insolvent to trade with the assets, which belonged to the estate, and the insolvent had contracted debts in the course of that trading, the new creditors would have had an equitable claim to the assets for the payment of their debts; or if the trustee had known that the insolvent was holding himself out as the owner of the furniture, and endeavouring to raise money upon it, and had with that knowledge abstained from

interfering or giving notice of his title, so as to prevent the persons who were negotiating from being imposed upon, he would in that case also have been precluded from setting up his title against the bill of sale. But he had no knowledge of any such attempts or purpose. He was merely passive, and was in ignorance that the insolvent was attempting to take such advantage of the indulgence shewn to him. To hold that under the circumstances the trustee had forfeited his right to the furniture would be to import without statutable authority the doctrine of reputed ownership into merely private transactions between debtor and creditor. I am constrained to hold that the furniture remained his for the benefit of the separate creditors, and that the bill of sale conferred on the defendants no right to take possession of it as against the trustee.

Upon the second point the law appears to me to be equally clear. The separate creditors were no parties to the order of discharge made by the joint creditors, and that order could only discharge the insolvent from the debt of the firm. He remained liable as before to his separate creditors, and as no resolutions had been made for closing the liquidation his after-acquired property belonged to the estate.

The result is that the plaintiff is entitled to recover the proceeds of the sale of all the furniture, and my judgment must be for him for the agreed amount, which is 302*l.* 17*s.* 3*d.*

The defendants appealed.

1878. Feb. 4, 7. *De Gex, Q.C.*, and *R. V. Williams* (*Lumley Smith*, with them), for the defendants. Upon the facts before the Court, three questions present themselves for decision. The first is whether the title of the plaintiff as trustee of Beverley is not displaced by the second liquidation. The plaintiff has allowed the goods to remain in the order and disposition of the debtor, and when he became insolvent a second time the property in them passed out of the plaintiff: *Butler* v. *Hobson* (1). Even if the seizure by the defendants was wrongful, the plaintiff's title is defeated; for a wrongful seizure does not take goods out of the order and disposition of an insolvent so as to prevent the operation of the

(1) 5 Bing. (N.S.) 128.

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Bankruptcy Act, 1869, s. 15, sub-s. 5: *Barrow* v. *Bell.* (1) That case has not been overruled by *Ex parte Foss* (2); the two decisions are reconciled in the judgment of the Court in *Ex parte Edey.* (3) Secondly, the plaintiff, by standing by and permitting the goods to remain in the possession of the debtor, has allowed the defendants to suppose that they were his. The case therefore comes within the principle laid down in *Troughton* v. *Gitley* (4), that if a man having a lien stands by and lets another make a new security, he shall be postponed. The law on the subject is illustrated and affirmed in *Tucker* v. *Hernaman* (5) and *Engelback* v. *Nixon* (6); *Ex parte Dewhurst* (7); *Ex parte Ford.* (8) Thirdly, the certificate of discharge operated as a discharge from the separate as well as the joint debts of the debtor: *Ebbs* v. *Boulnois* (9) will no doubt be cited as an authority against the certificate operating to discharge Beverley's separate estate from his separate debts; but when an insolvent gets his discharge, he is to be a free man, released from all his debts. There cannot be a partial discharge. The universal practice is to have one meeting of all the creditors, joint and separate, and one discharge. There cannot be two discharges.

Holl, Q.C., and *McLeod Fullarton*, for the plaintiff. The first point is only now started on behalf of the defendants; it was not relied upon when the case was before Lush, J., and it is sufficiently answered by the circumstance that the trustee under the second liquidation has disclaimed all interest in the furniture.

[BRAMWELL, L.J. We do not require any further argument from the plaintiff's counsel upon the first point.]

As to the second point, it is unnecessary for the plaintiff to dispute the principle laid down in *Troughton* v. *Gitley* (4); but it does not apply here. The authorities cited on behalf of the defendants do not assist the contention for them. In *Tucker* v. *Hernaman* (5) the assignees had permitted the bankrupt to practise as a solicitor; although a solicitor is not a trader, yet in the course of his business large sums of money may be deposited with him,

(1) 5 E. & B. 540; 25 L. J. (Q.B.) 2.
(2) 2 De G. & J. 230.
(3) Law Rep. 19 Eq. 264.
(4) Amb. 630.
(5) 4 D. M. & G. 395; 22 L. J. (Ch.) 791.
(6) Law Rep. 10 C. P. 645.
(7) Law Rep. 7 Ch. 185.
(8) 1 Ch. D. 521.
(9) Law Rep. 10 Ch. 479, at p. 485.

and the assignees must have been aware that the bankrupt might incur debts to a considerable amount; therefore the claims of the later creditors were properly preferred. Moreover, the property had been acquired after the bankruptcy. *Engelback* v. *Nixon* (1) was a case of trading with the consent of the trustee for the benefit of the creditors. *Ex parte Dewhurst* (2) is very distinguishable; in that case the trustee claimed, not specific goods, but money which had been acquired since the bankruptcy and paid pursuant to a contract. *Ex parte Hannington* (3) was probably decided upon its special facts. *Cole* v. *Coles* (4) is a strong authority that the title of a trustee or assignee is not barred by omitting to take possession of the insolvent's estate. The facts of this case fall precisely within the principle laid down in *Ex parte Ford.* (5)

As to the third point, it is plain that the joint creditors had no power to set Beverley free from a separate liability. The principle laid down by Mellish, L.J., in *Ebbs* v. *Boulnois* (6), is exactly in favour of the plaintiff as to this. In bankruptcy, the order of discharge is the act of the Court, and it will not be granted until all the creditors have been settled with; the decisions as to the effect of a discharge in bankruptcy do not apply here, where the proceedings are by liquidation under the Bankruptcy Act, 1869, s. 125, and it is plain upon referring to Rules 285, 287, 302, that in the present case the insolvent ought to have obtained a discharge from each class of creditors.

R. V. Williams, in reply. It is submitted that, although the decision in *Ebbs* v. *Boulnois* (7) may be right, the remarks relied upon by the plaintiff cannot be supported; they are mere obiter dicta and unnecessary to the decision. The suit was for specific performance, and whenever the title is doubtful it is not forced upon an unwilling purchaser. An order of discharge sets free a bankrupt from every kind of liability, and a certificate of discharge under liquidation proceedings has the same effect: *Megrath* v. *Gray* (8), *Ellis* v. *Wilmot.* (9) The only case, in which the effect of a discharge under a liquidation has been discussed, is *Ex parte*

(1) Law Rep. 10 C. P. 645.
(2) Law Rep. 7 Ch. 185.
(3) 18 W. R. 959.
(4) 6 Hare, 517.
(5) 1 Ch. D. 521.
(6) Law Rep. 10 Ch. 479, at p. 489.
(7) Law Rep. 10 Ch. 479.
(8) Law Rep. 9 C. P. 216.
(9) Law Rep. 10 Ex. 10.

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Hammond (1), and the reasoning of that case is entirely in favour of the defendants. If the contention for the plaintiff is right, the discharge of the insolvent was practically nugatory.

BRAMWELL, L.J. I think that the judgment of Lush, J., must be affirmed.

I will first dispose of the argument that the furniture was "in the possession, order, or disposition," of the insolvent within the meaning of the Bankruptcy Act, 1869, s. 15, sub-s. 5. The obvious answer to the contention for the defendants is that the trustee under the second liquidation has disclaimed all interest in the furniture, and until he asserts his right to it, the title of the plaintiff remains unimpeached. But I may further remark that, in my opinion the seizure by the defendants would prevent the doctrine from applying, even although the furniture was not removed. I do not think that seizure by the defendants was like a seizure by the sheriff under a writ of fieri facias against the goods of the insolvent; for the sheriff would have no power to take furniture belonging to the plaintiff as trustee. The seizure by the defendants rather resembled the taking the furniture under a distress for rent, which would put an end to the possession of the insolvent. The enactment, as it seems to me, only applies when all that the true owner has to do, in order to bring the goods again under his control, is something taking place between himself and the insolvent; otherwise there is no disposition with the consent of the true owner. This, however, it is unnecessary to decide, as the trustee under the second liquidation has disclaimed the interest in the furniture.

16 Ch D 570

Secondly, it has been argued that the plaintiff is deprived of his right to the furniture because he has stood by and has allowed the insolvent to deal with it as his own: is it to be laid down that if goods are left in the hands of an execution-debtor, the execution-creditor is to enjoy a priority as to them over the real owner? Is an upholsterer to lose his property because he has hired out furniture to an insolvent customer? It has been contended that there is a difference between cases of that kind and the present, because the plaintiff, as trustee, was guilty of neglect in leaving

(1) Law Rep. 16 Eq. 614.

the furniture in the insolvent's hands. I do not think that this distinction would be maintainable in law even if it were founded on fact. An intelligible principle is this: where in effect a declaration to all mankind is made that a person in possession of goods is entitled to them for all purposes, and may at his pleasure either sell or borrow money on them, the true owner can enforce his claim subject only to the rights of those who have bought or lent money on the goods: for instance, if a wine merchant be left in possession of wine, the fair inference is that it is his own, and a person may be justified in advancing money upon the security of it: here the goods being household furniture, no inference would be drawn that the insolvent had them in his possession for the purpose of selling them. It has been urged that the defendants were justified in treating the furniture as belonging to the insolvent, because money is frequently borrowed upon furniture by the true owners. I cannot assent to that argument: furniture is properly used when it is devoted to the purposes of the household. A good deal of reproach has been levelled at the plaintiff on the ground of his supposed laches; but his title is not extinguished unless his laches have misled the defendants. No principle laid down in any of the cases is adverse to the plaintiff's claim, and the only authority apparently opposed to it is *Ex parte Hannington* (1); but I think that the real explanation of that case is, that the primâ facie title to the furniture seized in execution was vested in the trustees of a settlement, and that the only claim of the trustee in bankruptcy to them was that the settlement was voluntary, and executed after the bankrupt had become unable to pay his debts: moreover, the assignee in bankruptcy had never attempted to set aside the settlement until the furniture was seized in execution. I cannot think that in the case before us the Chief Judge would have held that the title of the plaintiff was destroyed.

The third point was, the effect of the certificate of discharge. It is to be observed that this certificate relates to the joint liabilities of the partners, and not to the separate liabilities of Beverley; it therefore cannot affect his separate property. No resolution has been passed by his separate creditors for closing the liquidation, and dividends may still become payable out of his separate

(1) 18 W. R. 959.

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estate in respect of his separate debts. It has been said by the defendants' counsel that, as a matter of practice, two certificates of discharge, one for joint, the other for separate liabilities, are not granted to an insolvent partner: all that I can say is, that if it is intended to set the debtor free from both kinds of debts, the two certificates must be granted, for there must be resolutions to discharge him from his separate as well as his joint debts. If one order discharged from both kinds of liabilities, the following result would ensue: the joint creditors might be satisfied, and by a resolution declare that no future property of the debtor should be subject to his separate debts: this would be unfair to the separate creditors. Upon the other hand, the separate creditors might resolve that the debtor should be discharged from his joint liabilities; and then the joint creditors would be hardly dealt with. Moreover, if a discharge granted at a meeting of both several and joint creditors were sufficient, it does not appear that any such meeting has been held.

I think that the judgment must be affirmed.

BRETT, L.J. Several questions, some of very small importance, have been raised in the course of the argument before us, but I need notice only those which have been considered by Lord Justice Bramwell.

As to the first point, whether the furniture was vested in the trustee of the second liquidation as being in the "possession, order, or disposition" of the insolvent, it is sufficient to say that he has declined to assert any claim to them. Moreover, the defendants had seized them before the liquidation, and therefore they were not, as a matter of fact, under the control of the debtor. This point cannot be sustained, and the defendants' counsel evidently felt difficulty in arguing it.

As to the second point, I am content to rest my decision upon the grounds and reasons assigned in the judgment of Lush, J. I am willing to assume that the plaintiff would not have been entitled to recover, if he had authorized the insolvent to trade with assets of the estate, and if the defendants had been creditors in respect of debts contracted in the course of that trading; and I will further assume that the defendants would be entitled to

succeed, if the plaintiff had known that the insolvent was holding himself out as the owner of the furniture, and was endeavouring to raise money upon it, and if he had abstained from giving notice of his title: I am content to assume that these results necessarily follow from the decisions in *Ex parte Hannington* (1) and *Ex parte Ford* (2), although the former decision is a little hard to explain, except, perhaps, upon the ground that the assignee knew that the bankrupt was contracting debts. But assuming these propositions to be correct, I agree with Lush, J., that upon the facts before us the insolvent was not trading with the assets of his estate, and the plaintiff had no knowledge that he was attempting to borrow money. It may be true that the defendants did not know that the furniture belonged to the plaintiff at the time when they advanced the money; but I do not think that mere good faith entitles them to succeed. The argument upon their behalf is an attempt to import the doctrine of reputed ownership into the ordinary transactions between debtor and creditor. No authority can be found to support the contention for the defendants.

As to the third point, namely, the effect of the certificate of discharge, I do not propose to examine at length the provisions of the Bankruptcy Act, 1869. I adopt the view of Mellish, L.J., in *Ebbs* v. *Boulnois* (3); it is there laid down that "the meeting of the joint creditors is to be held before the meeting of the separate creditors, and it is quite usual for the discharge to be first granted by the joint creditors at their meeting, and by the separate creditors at their meeting immediately afterwards." But where there is only a meeting of joint creditors, the resolution to discharge operates merely as a discharge from the joint debts. It is clear that in the present case the joint creditors were summoned, and that the separate creditors were not summoned; therefore the discharge of the insolvent does not affect his separate liabilities.

I think that the judgment of Lush, J., ought to be affirmed in every respect.

COTTON, L.J. I think that this appeal fails in every respect. I will first deal with the question whether the furniture was in

(1) 18 W. R. 959. (2) 1 Ch. D. 521.
(3) Law Rep 10 Ch. 479, at p. 489.

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the order and disposition of the insolvent. If it was, it would pass to the trustee under the second liquidation; but he has declined to contest the question with the plaintiff, and if the person who would have the right by force of the Bankruptcy Act, 1869, s. 15, sub-s. 5, refuses to assert it, the defendants cannot rely upon it so as to defeat the title vested in the plaintiff.

As to the second question, namely, whether the plaintiff has so acted as to deprive himself of the right to the furniture, the defendants have falied to make out their case. No doubt, if a person having a title to property misleads other persons, so as to induce them to act under the belief that he has no title, he cannot afterwards be heard to say that he has a title; many cases to that effect have been decided in the Court of Chancery. I do not think, however, that that principle can be applied to the facts of the present action. It appears that the insolvent, whilst he was in possession of the furniture, but before his second liquidation, borrowed money upon the security of it; but in order to defeat the title of the plaintiff as trustee, it must be shewn that before the advance by the defendants the plaintiff knew that Beverley was about to deal with persons intending to become his creditors; but no evidence tending to establish knowledge of that kind was adduced. A different rule is to be applied when an insolvent trader has been left by his creditors in possession of his stock, for in that case they in effect declare that he is a free man and competent to contract such debts as may enable him to carry on his trade. In some respects *Tucker* v. *Hernaman* (1) was a strong decision, for the bankrupt was a solicitor, and not an ordinary trader, and the evidence as to the knowledge of the creditors was somewhat slight; but as the assignee had allowed the bankrupt to carry on business for thirty-five years without objection, it was held that the creditors under the bankruptcy must be postponed to the creditors subsequent to it. The only authority which appears to support the contention for the defendants is *Ex parte Hannington*. (2) The report is very short, and I can scarcely agree with what is stated to have been the ground of the judgment of the Chief Judge; in fact, no principle was laid down, and the decision may have proceeded upon a circumstance not stated,

(1) 4 D. M. & G. 394; 22 L. J. (Ch.) 791. (2) 18 W. R. 959.

namely, that the assignee was aware that the debt due to the execution creditor was contracted under a belief on his part that the furniture belonged to the bankrupt. The doctrine, that knowledge of the dealing by the insolvent with the property left in his charge is essential to deprive the trustee of it, is adopted by Jessel, M.R., in *Ex parte Ford.* (1) In the present case it is impossible to say that the trustee knew that the insolvent was obtaining an advance upon the security of the furniture; he merely, as an act of indulgence, allowed the debtor the use of it.

Then as to the third question, namely, the effect of the certificate of discharge; it is plain upon the facts that no meeting of the separate creditors was summoned. It is contended for the defendants that the resolution of the joint creditors to discharge the insolvent prevents the separate creditors from claiming property belonging to him. I think that the discharge has not that effect. The joint creditors have no interest in the ~~joint~~ assets until all the separate creditors have been paid. It seems to me that there must be meetings of the different classes of creditors. I come to this conclusion upon referring to the rules. Rule 285 relates to liquidation by partnership, and Rule 302 to the order of discharge. The case of *Ebbs* v. *Boulnois* (2) is against the defendants. That was not a positive decision: the suit was for specific performance; but it shews that the two judges of the Court of Appeal in Chancery inclined to the view that two discharges were necessary to set free an insolvent partner. The only case which appears inconsistent with the view which we take is *Ex parte Hammond* (3); but in that case the proceedings appear to have been governed by Rule 287, and not by Rule 285. In the case before us I think that the discharge by one class of creditors does not operate so as to annul the debts due to another class.

The appeal fails upon all grounds, and must be dismissed.

Judgment affirmed.

Solicitor for plaintiff: *E. H. Bailey.*

Solicitors for defendants: *Lewis, Munns, & Longden.*

(1) 1 Ch. D. 521, at p. 528. (2) Law Rep. 10 Ch. 479.
(3) Law Rep. 16 Eq. 614.

1878
Jan. 15.

[IN THE COURT OF APPEAL.]

ATWOOD *v.* CHICHESTER.

Practice—Setting aside Judgment by Default—Delay—Action against Married Woman—Separate Estate without Power of Anticipation.

Where no irreparable wrong will be done to a plaintiff who has obtained judgment by default, lapse of time is not a bar to an application to set it aside.

A married woman, having a separate estate without power of anticipation, is not liable to be sued personally in respect of a debt contracted during her coverture; and in order that a creditor may obtain payment out of her personal estate, he must join as defendants her husband and the trustees of her settlement.

APPEAL from a refusal of the Queen's Bench Division to set aside a judgment by default.

The defendant, a married woman having a separate estate without power of anticipation, signed at the request of her husband a cheque, and also a bill of exchange. Her husband negotiated these documents with the plaintiff for a valuable consideration. The amount thereof remaining unpaid, the writ of summons in the present action was issued and served upon the defendant; she handed it to her husband who promised to attend to it. No appearance having been entered, judgment was signed upon the 19th of October, 1876; a summons taken out to set aside the judgment was dismissed upon the 30th of July, 1877, by a master. Field, J., upon the 3rd of August, made an order that the defendant should pay the debt by instalments. A summons was taken out upon the 9th of November, to commit the defendant for non-payment of the instalments, and upon the 26th of November, a summons to set aside the judgment in the action was dismissed by Pollock, B. The defendant appealed upon the 21st of December to the Queen's Bench Division, which refused to interfere. The defendant appealed to this Court.

Jan. 12. *W. G. Harrison*, for the defendant. The action is misconceived: the defendant is a married woman, and cannot render herself personally liable. At law, a plea of coverture was a good defence to any action against a married woman upon any contract entered into by her; and in equity there could not be a

decree against her personally: 1 Daniel's Chancery Practice, 168 (5th ed.); *Aylett* v. *Ashton.* (1) The Judicature Acts have not imposed a more extensive liability upon married women. It is true that she may, under some circumstances, by contract bind the property settled to her separate use; but then her husband and trustees must be joined in the action with her. Therefore, as the plaintiff has suffered no substantial wrong by the delay, the defendant ought to be at liberty to appear and defend.

A. L. Smith, for the plaintiff. The delay has been so great as to deprive the plaintiff of all claim to relief by the interposition of the Court; as she has omitted to appear at the proper time, she is liable to all the consequences of a judgment by default: *Poole* v. *Canning* (2); *Dillon* v. *Cunningham.* (3)

Cur. adv. vult.

Jan. 15. The following judgments were delivered:—

BRAMWELL, L.J. It is clear that if the defendant had made an early application to set aside the judgment, she would have been allowed to defend upon proof that her conduct has been bonâ fide. Her defence is not technical, nor does it resemble an objection that an action has been brought too soon: the defence is meritorious and substantial. By the law of this country a married woman cannot bind herself except by binding her separate property—she cannot bind herself personally. It is plain that a mere omission to enter an appearance within due time would not have been a bar to an early application. But it has been argued that the defendant is now too late. When sitting at chambers I have often heard it argued that when irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but that in other cases the objection of lateness ought not to be listened to, and any injury caused by the delay may be compensated for by the payment of costs. This I think a correct view. Here the action in its present form is not maintainable, and it must be taken that when the plaintiff issued the writ, he knew that he could not

(1) 1 My. & Cr. 105, at p. 111. (2) Law Rep. 2 C. P. 241.
(3) Law Rep. 8 Ex. 23.

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succeed: what harm will be done to the plaintiff by allowing the defendant to appear? The objection of lateness ought not to be allowed to prevail. But then has her conduct been bonâ fide? Has she acted merely with want of care and through ignorance, or did she really intend to suffer judgment and make herself liable upon the documents which she had signed? Upon the facts I come to the conclusion that the defendant did not intend to make herself liable in this action: she has not acted malâ fide, but she has a good and meritorious defence, and the plaintiff must have known that he could not succeed. With all respect to the opinion of the Queen's Bench Division, I cannot agree with the decision.

BRETT, L.J. The plaintiff has not been either deceived or irreparably injured by the course which has been taken. The defendant has separate property without power of anticipation; the documents were signed by the defendant for the benefit of her husband, who negotiated them with the plaintiff. At the time when he took them, he knew that the defendant was married; yet he has sued her personally, and not as if he were intending to realise her property in order to obtain payment of the money due to him. From the facts before us, I draw the inference that when she handed the writ to her husband, she did not understand its meaning, and that she did not know the consequences of suffering judgment by default. After various other proceedings, a summons is taken out to commit the defendant. Now, if it could have been shewn that the object of the writ was at the time of service explained to her, she could not at this stage of the proceedings have been permitted to defend after suffering judgment by default; but she does not appear to have been informed by her husband what her position really was. I agree with the view of Lord Justice Bramwell; the plaintiff could not have successfully prosecuted this action, and therefore he has suffered no irreparable mischief by the delay.

The judgment must be set aside.

COTTON, L.J. The plaintiff could not, by this action, have compelled the defendant to pay the securities signed by her. In

equity a married woman could bind her separate estate, but she could not render herself personally liable; in a court of law she could not be held responsible upon any contract entered into during coverture; so that neither at law nor in equity, could a creditor enforce a personal remedy against her. And none of the provisions of the Judicature Acts have rendered a married woman liable to be sued as if she were unmarried. I should have thought that if the defendant had lain by intentionally, she could not be now allowed to appear; but the neglect to defend must be attributed to her husband, and she cannot be considered to have been guilty of such laches as to disentitle her to relief; possibly there might have been more promptness on her part, but she has not forfeited her right to have the judgment set aside. It is true that the plaintiff gave credit to the husband in exchange for the documents signed by the defendant; but at the time when he commenced this action he must have known the true position of the defendant. In order to obtain payment out of her separate estate she ought to have been sued together with her husband and the trustees of her settlement; the present action was brought for the purpose of obtaining a judgment, which cannot be lawfully obtained against a married woman. The judgment must be set aside, and the defendant allowed to defend.

Appeal allowed.

Solicitors for plaintiff: *Plews, Irvine, & Hodges.*
Solicitor for defendant: *Apps.*

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May 6, 7.

In re HERITAGE. *Ex parte* DOCKER.

*Solicitor and Client—Costs—Taxation after Payment—Defendant agreeing to pay Plaintiff's Solicitor fixed sum for Costs—Special Circumstances—*6 & 7 *Vict. c.* 73, *ss.* 37, 38, 41.

The defendant in an action agreed, through his solicitor, to pay the plaintiff's solicitor a fixed sum for his costs and for his trouble in promoting a composition between the defendant and his creditors. Within twelve months of the payment of the amount the defendant took out a summons for the delivery by the plaintiff's solicitor of a bill of his costs:—

Held, that no fraud or undue pressure upon the defendant having been established, there were no "special circumstances" within the meaning of 6 & 7 Vict. c. 73, ss. 37, 38, 40, 41, to warrant the application:

Semble, that the defendant was not a party "chargeable" within 6 & 7 Vict. c. 73, so as to be entitled to make the application.

MOTION that an order of Field, J., at chambers, dismissing a summons for the delivery by Mr. F. Heritage, solicitor, of his bill of costs in all matters in which he had been concerned for the applicant E. S. Docker, and the Crédit Foncier, might be set aside.

It appeared from the affidavits that in July, 1875, Mr. Heritage, instructed by the Crédit Foncier, commenced an action against Mr. Docker to recover the amount of a promissory note indorsed by him to the Crédit Foncier. Proceedings in bankruptcy were also taken by the Crédit Foncier against Mr. Docker in respect of the note. In January, 1876, he presented a petition for the liquidation of his affairs by arrangement or composition, and ultimately resolutions were passed by his creditors (who were practically represented by the Crédit Foncier) accepting a composition, to be raised by a loan upon the separate estate of his wife. Mr. Heritage required also that his costs should be paid in full, and Mr. Honey, who acted as solicitor for Mr. Docker, agreed that they should be fixed at 200*l.*, Mr. Heritage having, as he stated, incurred considerable trouble in procuring creditors to attend the meetings and assent to the composition, and having incurred expense in examining Mrs. Docker's title to her separate estate, and in valuing the property, and in relation to the proposed sale of other property belonging to the latter.

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In February, 1877, this sum of 200*l.* was paid to Mr. Heritage, Mr. Docker stating in his affidavit that the amount was more than treble what could have been charged in an ordinary bill of costs, and that he was informed by Mr. Honey that Mr. Heritage had said that if the amount was not paid he would advise his clients not to assent to the resolution. This statement was unsupported by any affidavit from Mr. Honey, and Mr. Heritage on his part declared that he did not put the slightest pressure upon either Mr. Honey or Mr. Docker, and that the arrangement was in all respects beneficial to the latter.

In 1878, Mr. Docker having changed his solicitor, applied to Mr. Heritage for a bill of costs, which was refused. In the following February, but within twelve months of the payment, the summons above-mentioned was taken out.

C. Russell, Q.C., and *M. Daniel*, in support of the motion. The applicant's right to a taxation of the bill is founded upon 6 & 7 Vict. c. 73, s. 38 (1). The "special circumstances" required by that section are supplied by the facts, first, that the amount paid is shewn to have been largely in excess of what could have been claimed in a proper bill of costs; and, secondly, that it was paid

(1) 6 & 7 Vict. c. 73, s. 37, [after enacting that solicitors are not to commence an action for the recovery of any fees until one month after the delivery of a signed bill,] provides that "upon the application of the party chargeable by such bill within such month," the bill may be referred to taxation.

By s. 38: "Where any person, not the party chargeable with any such bill within the meaning of the provisions hereinbefore contained, shall be liable to pay, or shall have paid, such bill to the attorney or solicitor: . . . or to the party chargeable with such bill, it shall be lawful for such person . . . to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make."

By s. 40: For the purpose of any such reference upon the application of the person not being the party chargeable within the meaning of the provisions of this Act, or of a party interested as aforesaid, it shall be lawful . . . to order any such solicitor. . . . to deliver to the party making such application a copy of such bill.

By s. 41: The payment of any such bill as aforesaid shall in no case preclude the Court or judge to whom application shall be made from referring such bill for taxation if the special circumstances of the case shall, in the opinion of such Court or judge, appear to require the same—provided the application for such reference be made within twelve calendar months after payment.

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under great pressure. *Re Dickson* (1) and *Re Strother* (2) are similar cases, where a taxation was ordered after payment.

Reginald Brown, in support of the order. First, Mr. Docker does not come under the description of persons entitled to make this application. Sections 38 and 41, in referring to persons who shall be liable or shall have paid a bill, must be taken to mean any one who is liable and shall have paid by reason of such liability. Any one who has given an indemnity or guarantee against costs would be in this position, but a voluntary payment like that in the present case can give no right under the statute: *Re Becke.* (3) Secondly, assuming that this application is within s. 41, it gives the applicant no right to ask for the delivery of a bill of costs, but only for the taxation of a bill already delivered.

[LUSH, J. But does not s. 40 give the applicant a right to have the bill delivered for the purpose of having it taxed afterwards?]

Thirdly, no "special circumstances" are shewn. The application is barely within the statutory limit of one year, and it is made after the applicant has been discharged from the action brought against him by means of the arrangement with Mr. Heritage. Delay may by itself be an answer to the application: *Re Harrison.* (4) As to the observation that the payment was made under pressure, the only pressure was to obtain payment of the principal debt. A solicitor may without fraud require to be paid upon a bill which is not to be taxed: *Re Harding* (5); *Re Harper* (6); *Re Neate.* (7)

COCKBURN, C.J. I entertain a strong opinion that this case is not within the terms of ss. 37 and 38 of the Act 6 & 7 Vict. c. 73. When we look at the terms of s. 37 it would seem that the legislature meant that the right to have a bill of costs delivered with a view to its taxation should be given to the person who was himself liable to have an action brought against him for the costs, and that it does not apply to the case of a defendant in an action, who, if defeated, must pay the costs, for in that case the costs are taxed as between party and party and upon a different footing. Now

(1) 26 L. J. (Ch.) 89.
(2) 3 K. & J. 518; 26 L. J. (Ch.) 695.
(3) 5 Beav. 406.
(4) 10 Beav. 57.
(5) 10 Beav. 250.
(6) 10 Beav. 284.
(7) 10 Beav. 181.

the present is not a case arising out of the relation of solicitor and client; it is the case of a defendant who is sued and who before he has by law become liable to pay costs agrees to pay them and to have them fixed at a given amount. And s. 38, though it might appear to embrace such a case as this, merely enacts that the privilege conferred by s. 37 shall apply in the case of persons who are in the same position as solicitor and client, and who are to have the same rights as the client himself has, for example, any one who has guaranteed the clients' costs is entitled to be in no worse position than he is.

It is not, however, necessary to decide this point, for assuming that the case is within s. 38, but that a defendant chooses instead of having his costs taxed to agree that instead of being taxed they shall be put at a lump sum, and there is no suggestion of fraud or any unfair practice, can it be said that there are any "special circumstances" which entitle the applicant to have the bill taxed? No fraud is suggested here, and the case is not so strong as it would have been if the defendant had acted without the intervention of a solicitor. It might well be that any one ignorant of the practice as to law charges could be induced to enter into an unfair bargain, and in such a case it might be more satisfactory that the agreement should be reviewed. It is, however, enough to say that no such case has been shewn for the exercise of our jurisdiction.

MELLOR, J. I am of the same opinion, and though it is unnecessary to decide the point, I think the Lord Chief Justice has put the right construction on the statute.

With regard to the facts, what happened was that there was a treaty as to the payment of costs by the applicant, and he, through his solicitor, said in effect, "What will you take as a lump sum." There was no pressure on him; he made the bargain voluntarily, and to suit his own purposes. Then, after a delay, which by itself would in my opinion be fatal to the application, he comes before the Court for the purpose of shewing that he has paid too much, and asking that he may be at liberty to re-open the matter. I think the order at chambers was quite right.

LUSH, J. I am of the same opinion. This is a most ungracious application, and, moreover, I think the case is not within the

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statute at all, and that s. 38 only applies where a person stands in such a relation to the client (who has retained the solicitor) that he is bound to indemnify him against the costs, and is therefore entitled to the same privilege which the section confers on the client. But the applicant is not in this position. There was a voluntary agreement by him to pay the solicitor on the other side a lump sum for costs and other payments, and this sum was paid and accepted in lieu of a demand comprising all the items in a bill of costs. Such a case is not within the statute.

Application refused.

Solicitors: *W. H. Lydall*, for applicant; *F. Heritage*, in person.

June 27, 28; *Aug.* 8.

MARTIN *v.* MACKONOCHIE.

Prohibition—Court of Arches—Monition to abstain in future from illegal Practices—Suspension of Incumbent for Contumacy—Power to deal with subsequent Offence on Motion—53 Geo. 3, c. 127, s. 1.

A clerk in orders who has, in a criminal suit, been admonished by the Court of Arches to abstain from illegal practices in the services of the church, cannot for disobedience to the monition be summarily condemned to suspension, and a prohibition will be granted to restrain the execution of any such sentence.

Hebbert v. *Purchas* (Law Rep. 4 P. C. 301) dissented from.

A suit having been instituted against the incumbent of a parish under 3 & 4 Vict. c. 86, charging that he had been guilty of illegal practices in the services of the church the Court of Arches by a decree having the force of a definitive sentence pronounced the defendant guilty of practices which were offences against the laws ecclesiastical, pronounced sentence upon him of suspension ab officio for six weeks, and admonished him to abstain in future from the practices thereby condemned. The monition was duly served upon the defendant, and application having been subsequently made to the Court, alleging that he had been guilty of disobedience to the monition, the Court declared that he had disobeyed the monition, and further admonished him to abstain from the practices in question. A second monition was accordingly issued, and a further application having been made on affidavits shewing continued disobedience, and asking that the monitions might be enforced in such manner as to the Court should seem meet, the Court, the defendant failing to appear, decreed that he had disobeyed the monitions; declared him to have been guilty of contumacy, and sentenced him to be suspended ab officio et beneficio for the term of three years:—

Held (by Cockburn, C.J., and Mellor, J., Lush, J., dissenting), that both the monitions were beyond the jurisdiction of the Court of Arches and that a prohibition must be granted, for a monition in a criminal suit could not be appended to a definitive sentence awarding a specific punishment so as to warrant any

further proceedings, on a repetition of the offence, as for contumacy, and even if a monition could be so pronounced, disobedience to it could not be punished by suspension but only by imprisonment as provided by 53 Geo. 3, c. 127, s. 1.

By Lush, J., dissenting, that the prohibition ought not to be granted, for the monitions were neither expressly nor impliedly prohibited by the Act 3 & 4 Vict. c. 86, and the question whether they were in accordance with the established practice of the Court of Arches was one which did not affect the jurisdiction of that Court, and could not be considered upon an application for a prohibition.

Rule calling upon Lord Penzance, the official principal of the Arches Court of Canterbury, and J. Martin, to shew cause why a writ of prohibition should not issue to prohibit the said Court from publishing, proceeding with, or enforcing a decree of suspension ab officio et beneficio made against the Rev. Alexander H. Mackonochie, clerk, in a suit of *Martin* v. *Mackonochie*, such decree being one which was made without jurisdiction.

The facts as disclosed by the affidavits will be found in the judgments of Cockburn, C.J., and Lush, J.

June 27. *Sir H. Giffard, S.G.* (*C. Bowen*, with him), for Lord Penzance, and *A. J. Stephens, Q.C.* (*Jeune*, with him), for *Martin*, the complainant, shewed cause. The Court of Arches had jurisdiction over this suit, and its decision can only be questioned by appeal to the Judicial Committee of the Privy Council, and not upon an application for a prohibition. Two points are urged by the defendant, first, that there was no jurisdiction as part of the original sentence to admonish the defendant to abstain in future from illegal practices, and, secondly, that the Ecclesiastical Court cannot suspend or deprive a clerk in orders by way of punishment for a mere contempt of Court. But, in the first place, the monition and decree founded upon it was a proceeding in execution of the original judgment, and not a punishment for contempt of Court. There is ample authority to shew that suspension is the proper punishment for disobedience to a monition: Oughton's Ordo Judiciorum, tit. vii. 12; Ayliffe, Parergon, p. 208. Suspension or deprivation are proper ecclesiastical censures of the same character as excommunication, and are applicable to any of the higher offences, such as contumacy: *Harrison* v. *Archbishop of Dublin* (1), which shews also that the sentence may be passed in a

(1) 2 Bro. P. C. 199.

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summary proceeding. The recent cases in the Privy Council of *Martin* v. *Mackonochie* (1) and *Hebbert* v. *Purchas* (2) are in point. In the latter there was a sentence of suspension on motion for contumacy, or persistent disobedience to an order of the Court. To grant this prohibition it would be necessary to overrule the decisions of a Court of Appeal. Secondly, the monition to abstain from future offences is in accordance with the practice of the Court of Arches. It is in the nature of a perpetual injunction. The disobedience is charged upon affidavits of which the defendant has notice, so that he has the same advantages as he would have in a fresh suit. The non-observance of the monition constitutes a substantive offence, and the Ecclesiastical Court can deal with it without the institution of a fresh suit. The offence, illegality in the performance of divine service, is continuous, the judgment also is continuous, and the punishment is for a continuous disregard of it.

June 28. *Charles, Q.C.*, and *W. Phillimore*, in support of the rule. Assuming that the conduct of the defendant amounted to a contempt, there is no authority in the Ecclesiastical Court which would warrant the punishment of it by a suspension. The only mode of punishing contempt is by the process prescribed in 53 Geo. 3, c. 127, s. 1, in lieu of the former process by excommunication, viz., by significavit, followed by a writ de contumace capiendo. When the statutory process is adopted the offending party by making his submission and obeying the order of the Court, can procure his release from custody, but the result of the mode of procedure adopted here is, that on summary process the offender is suspended absolutely without any opportunity of relieving himself by obedience from the consequences of his contempt. And although the Ecclesiastical Court might suspend ab officio et beneficio, or deprive for a substantive offence, it cannot suspend on summary process for disobedience of the order of the Court. The repetition of the offence against which the monition was issued might be made the subject of fresh proceedings, and, in that case, the party proceeded against would have an opportunity of pleading over again, and if he was concluded in the

(1) Law Rep. 3 P. C. 409. (2) Law Rep. 4 P. C. 301.

Court below might appeal to the superior Court. It is contrary to principle that for what is really a fresh ecclesiastical offence the defendant should be punished summarily. In *Hebbert* v. *Purchas* (1) the same process was employed as in the present case by the Judicial Committee of the Privy Council, but it is to be observed that no counsel appeared for the respondent, and the matter was not therefore thoroughly discussed, and with the exception of that case there is no precedent for such a mode of procedure. The other side are in this dilemma: either this is a case of contempt, and then the only mode of procedure is under the statute 53 Geo. 3, c. 127, or a fresh ecclesiastical offence, and then it cannot be dealt with summarily.

[COCKBURN, C.J. The contempt to which the statute applies, appears to be where the party fails to do something he is advised to do in the course of the suit, and the object is not so much to punish as to compel obedience.]

This is not really the case of enforcing obedience of an order of the Court, but imposing a penalty for a fresh substantive offence. The cases of *Harrison* v. *Archbishop of Dublin* (2), and the other cases which have been relied on as authority for this mode of procedure are inconclusive. It is plain that in *Harrison* v. *Archbishop of Dublin*, No. 1 (3) there was a regular suit for the ecclesiastical offence of not appearing at the visitation. It was not a case of summary procedure. In *Harrison* v. *Archbishop of Dublin*, No. 2 (4) the suspension was not for disobedience to a monition, and there is nothing to shew that the suspension was a beneficio. The suspension must have been ab ingressu ecclesiæ, or, at the most, ab officio. Similarly, cases in which there was a suspension for non-appearance, are no authority in the present case. The term suspension where it occurs without more in the old precedents, means suspension ab ingressu ecclesiæ merely. See Lyndwood's Provinciale, 39, referring to John of Athons' Commentary on the Constitutions of Otho. There is no precedent

(1) Law Rep. 4 P. C. 301.

(2) 2 Bro. P. C. 199, and Parliamentary Papers, 199, 3rd April, 1868. Return of Appeals to the High Court of Delegates, No. 135.

(3) 2 Bro. P. C. 199.

(4) Parliamentary Papers, 199, 3rd April, 1868. Return of Appeals to the High Court of Delegates, No. 135.

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prior to *Hebbert* v. *Purchas* (1) for suspension a beneficio for disobedience to a monition.

The term "contumacious" as employed in the precedents on which the promoter relies merely implies nonappearance, and there is nothing to shew that any other kind of suspension than suspension ab ingressu ecclesiæ was ever inflicted in case of nonappearance. There is no mention in any of the text-books of suspension ab officio or ab officio et beneficio, as a punishment for contumacy or a summary punishment for disobedience of a monition. The only punishment spoken of for contumacy is excommunication. Johnson's Vade Mecum, 180; Cockburn's Clerk's Assistant, 12.

[They also cited: *In re the Dean of York* (2); *Bishop of Kildare* v. *Archbishop of Dublin* (3); *Jones* v. *Bishop of Bangor* (4); *Burder* v. *Pughe* (5); *Keith* v. *Trebec* (6); Oughton's Ordo Judiciorum, 66, tit. 37, 141, tit. 89, ed. 1728; Report of Ecclesiastical Courts Commission, 15th Feb. 1832, pp. 16, 19, 66; 23 Hen. 8, c. 9.]

Cur. adv. vult.

Aug. 8. The following judgments were delivered:

LUSH, J. This suit was instituted by letters of request from the Bishop of London, pursuant to s. 13 of the Church Discipline Act (3 & 4 Vict. c. 86). The cause was heard on the 7th of December, 1874, when the Court of Arches decreed that the defendant had been guilty of certain practices which were offences against the laws ecclesiastical, pronounced sentence of suspension ab officio for six weeks, and admonished the defendant to abstain in future from the practices thereby condemned.

The defendant appealed from this judgment to the Privy Council, but abandoned the appeal before it came to a hearing.

On the 26th of June, 1875, a monition, in accordance with the decree, was duly served, and suspension published. On the 18th of March last, notice was served on the defendant, alleging that

(1) Law Rep. 4 P. C. 301.
(2) 2 Q. B. 1.
(3) 2 Bro. P. C. 179.
(4) Parliamentary Papers, 199, 3rd April, 1868. Return of Appeals to the High Court of Delegates, No. 63.
(5) 1 Jur. (N.S.) 1178.
(6) Phill. Eccl. Law, 1181; 2 Atk. 498.

he had, in contravention of, and disobedience to, the monition, on certain days therein specified (several of which were within two years from that date, and the last of which was on the 24th of February last), done certain specified acts (being acts which he had been admonished to abstain from), and that the promoter would on the 23rd of March, upon proof of the premises, ask that it might be declared that the defendant had not obeyed the monition in the particulars therein set forth, and would further ask that the monition might be enforced as to the Court should seem meet; and that the defendant might be condemned in the costs of the proceeding. Copies of the affidavits intended to be used were served at the same time. The defendant did not appear, and on the 29th of March a second monition was served upon him, which recited the previous proceedings in the suit, the decree, the service of the former monition and the notice, and which alleged that on the 23rd of March, then instant, the Court having read the affidavits, copies of which had been served, did pronounce and declare that the defendant had failed to obey the monition in not having abstained from the before-mentioned practices; and did further admonish the defendant to abstain for the future from those practices. On the 20th of April a further notice was served, to the effect that it had been alleged that subsequently to the service of the last-mentioned monition—namely, on the 31st of March and the 7th of April, the defendant had repeated the practices against which he had been admonished, and that the promoter would apply to the Court on the 11th of May, and would, upon proof of the premises, ask that it might be declared that the defendant had not obeyed the monitions, and that the same might be enforced as to the Court might seem meet, and that the Court might take such other steps in the matter as justice might require. Copies of the further affidavits intended to be used accompanied the notice.

The defendant still declined to appear at the time appointed, and the Court, after reading the affidavits and taking time to consider, declared that the defendant had disobeyed and contravened the monition of the Court, and decreed that he should be suspended ab officio et a beneficio for a period of three years, and be condemned in the costs of the application. Thereupon an application

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was made to this Court for a prohibition, on the ground, and the only ground on which a prohibition can be granted—namely, that in awarding a suspension under such circumstances the Court of Arches had exceeded its jurisdiction. A rule to shew cause was granted, which came on for argument shortly before the last assizes, when the Court took time to consider its judgment.

The contention of the defendant is that he has been punished for a contempt of Court; that a contempt of Court is punishable only by imprisonment, under 58 Geo. 3, c. 127; that such a proceeding as the present is not in accordance with the established practice of the Court of Arches, and that even if it were shewn to have been so prior to the passing of the Church Discipline Act, the provisions of that Act rendered its continuance illegal.

It was not disputed that the sentence complained of is one which might lawfully have been pronounced for such ecclesiastical offence, as the Court had declared the defendant to have been guilty of, if a fresh suit had been brought against him.

I pause here for a moment to remark that much of the argument which was addressed to us appears to me to be based on the fallacy of treating the acts which the defendant was found guilty as a mere contempt of Court. A contempt of Court may, or may not, involve an ecclesiastical offence. A wilful disobedience of an order of the Court made to enforce a private right, such as an order for payment of costs, is a contempt of Court but nothing more. The acts of the defendant amount to a contempt of Court, inasmuch as he thereby committed a breach of the monition or injunction of the Court; but they amount to much more than a contempt of Court. They constitute a distinct ecclesiastical offence. They were done in defiance not only of a monition of the Court, but in defiance of the law as declared by the Court, which is the constituted authority in such cases, and would have been punishable if there had been no monition, and the sentence is admitted to be an appropriate punishment for such a breach of the law. Of course the Court could not have taken cognizance of the offence without a suit; but here there is a suit which has resulted in a decree and a monition; and the argument for the defendant assumes that for some purposes at least the monition is still in force. Whether it is operative to enable the Court by means of

it to suppress the repetition of the offence—in other words, whether the monition can be effectually enforced, is the question. Now, unless it be shewn that the defendant is under some disadvantage by being prosecuted for the new offence by summary proceeding on the monition, or unless such a proceeding is prohibited by the statute, no reason can be assigned why a new suit, which is undoubtedly the more costly and more dilatory, and therefore the less efficacious proceeding for the purposes of justice, should be adopted in preference to the more summary proceeding. The object is the same as would be the object of a new suit —namely, to put an end to the practices which have been denounced as illegal; and the sentence is the same as would or might have been pronounced in the form of a decree in that new suit.

I proceed to notice in the first place the arguments based on the Church Discipline Act, because if the proceeding complained of is either expressly or by implication, forbidden by that Act, it matters not, what the ancient practice of the Court of Arches was, or what construction the Court might have put upon the statute itself. For it is the province and the duty of this Court to construe Acts of Parliament which affect the temporal rights of the subject and to protect the subject in the enjoyment of those rights. The object of the Church Discipline Act is declared in the preamble to be "to amend the manner of proceeding in causes for the correction of clerks," and this it effects by repealing the statute, 1 Hen. 7, c. 4, which gave summary powers to archbishops and bishops, and by prescribing a uniform course of proceeding for the institution of suits. Then follows the 23rd section, which enacts that "no criminal suit or *proceeding* against a clerk in holy orders for any offence against the laws ecclesiastical shall be instituted in any Ecclesiastical Court otherwise than is hereinbefore enacted or provided." The argument is, that this is a "proceeding" for an offence against the laws ecclesiastical, and not being instituted in the manner prescribed by the Act, it is, therefore, a violation of the Act. This argument appears to me to be founded on a misapprehension of the scope and purpose of the Act. If it were to prevail, the consequence would be that a decree admonishing the defendant, in a suit to abstain in future from practices

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which were thereby declared to be illegal, would be nugatory; and the Act would have taken away, and that by implication only, one of the most, if not the most ancient and probably the most effective processes of the Court. For if the acts of the defendant were treated, as it was contended they ought to have been treated, as a mere contempt of Court, punishable under 58 Geo. 3, that would be equally open to the objection that it was a "proceeding" for an offence which had not been already adjudicated on; and it would follow that no monition enjoining abstention for the future could ever be enforced at all. It is clear to my mind, that what the Act meant to abolish by the word "proceeding," was those arbitrary acts by which forfeiture or suspension was inflicted without a regular suit, of which precedents are to be found in the books; and that it no more intended to interfere with any established mode of enforcing the decrees of the Court, than it did with substantive law. Other sections recognize as still existing and to continue, the ancient forms of sentence, and the ancient modes of enforcing it. For example, the 11th section, speaking of the sentence to be pronounced upon a hearing before the bishop and assessors, says that it shall be "according to ecclesiastical law," and the 12th says that "all sentences by any bishop or his commissary shall be enforced by like means as a sentence pronounced by an Ecclesiastical Court of competent jurisdiction." The Act leaves the kind of sentence to be awarded and the mode of enforcing it as it was before. It prescribes the mode by which criminal proceeding shall be originated against a clerk, but once commenced and carried on to judgment it leaves the suit to be worked out to execution according to the ordinary course and practice of the Court. This section, therefore, appears to me to have no bearing upon the question before us.

There is a proviso in the 13th section which at first sight seems to present a difficulty. It was not to my recollection noticed in the argument, but I am desirous of calling attention to it, that it might not be supposed I had overlooked it. The 15th section gives an appeal to the Privy Council. The 13th section, in anticipation of the 15th, provides that "no appeal from any interlocutory decree or order, not having the force of a definitive sentence, and *thereby ending* the suit in the Court of

Appeal of the province, shall be allowed, save by the permission of the judge of such court." At first sight the wording of the clause suggests that when the case is ripe for appeal, it is ended for all purposes in the Court below. But a moment's consideration suffices to make it clear that these words are only intended to emphasise the distinction between an interlocutory and a final judgment, and that they could not have been intended to enact that a definitive sentence shall end the suit in the sense that nothing more shall be done upon it, not even to enforce the sentence whether there is an appeal or not. That would be a construction too absurd to be accepted, and this, no doubt, accounts for this proviso not having been referred to in the argument.

I come, therefore, to the conclusion that the mode of proceeding which was adopted in this case, and which is the subject of complaint before us, is not prohibited by the Church Discipline Act. There being no other Act of Parliament bearing on the point, the only remaining question is, whether it is in accordance with the established practice of the Court. It is admitted, as I have already observed, that the Court had jurisdiction over the subject matter, and jurisdiction to pronounce, for the offence of which it has adjudged the defendant guilty, the very sentence which it has pronounced.

I regret that I am compelled to differ from my learned colleagues upon this branch of the case also. I think that we have no jurisdiction to inquire whether the ordinary course of procedure has or has not been followed in this case. The practice and procedure of every court where no Act of Parliament intervenes to regulate it, which I assume to be the case here, is within the exclusive cognizance of the Court itself. If in a particular case the mode of proceeding were shewn to be ever so irregular and at variance with the ordinary practice, it would not give this Court jurisdiction to interfere. Irregularity in procedure is matter of appeal, not of prohibition, and the appeal is given to the Privy Council, not to this Court. It is, of course, conceivable as a possibility, that a system of procedure might be so vicious as to violate some fundamental principle of justice; as if, for example, it allowed a suit to be instituted and prosecuted to judgment in the absence of the party sued, and without summoning him, or giving

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him any opportunity of defending himself. That would entitle this Court to interfere. It is quite superfluous to say that nothing of the kind is or could be suggested as regards the procedure in the Court of Arches. But neither was it, or could it, be suggested that the applicant suffered any disadvantage whatever from not having been cited to answer these charges in a fresh suit. The monition gave him full and precise notice—as full and precise as articles in a fresh suit would have given him—of what he was charged with; he had, moreover, an advantage which he would not have had in a fresh suit—namely, the advantage of knowing who were to be the witnesses against him, and what they were going to say. Every opportunity was given him of refuting the accusation; he might have appeared and cross-examined the witnesses, have given evidence on his own behalf, and have called witnesses to disprove the allegations. The same ground of defence and the same opportunity of putting it forward were open to him on the monition as would have been open to him on the hearing of a suit. For he could not in a second suit have contested the law as declared in the original judgment. That had become *res judicata*. Having abandoned his appeal, he could not have been heard to argue over again that the practices condemned in that suit were lawful practices. All that he could have done in a second suit would have been to dispute the facts, and that he could have done by way of answer to the monition, as fully, as freely, and as advantageously as if he had been defending himself in a regular suit. The monition deprived him of no right or advantage which the Church Discipline Act intended that a defendant should have.

I must, therefore, decline to enter into the question which was so earnestly and at such length discussed at the bar—namely, whether the precedents do or do not sanction the course of proceeding which is complained of. As I have already said, I think that is a matter for the Court of Arches to decide, subject to an appeal to the Privy Council. I feel it due to the learned judge of the Court of Arches, however, to advert to the fact that not only has no authority to the contrary been found, but that the various authorities on the subject, which are collected in the return presented to the House of Commons in 1868, and which

were the subject of so much comment in the argument, have been considered by the Privy Council on appeal, and that high tribunal has affirmed the competency of the Court of Arches to pass such a sentence as the one in question upon a similar proceeding for contumacy: *Hebbert* v. *Purchas* (1). It was strongly urged upon us, in disparagement of that decision, that the Privy Council had not the assistance of counsel on the part of the then respondent, and that if the authorities had been examined and discussed from an opposite point of view, that Court might have come to a different conclusion. That may possibly be so; but I cannot speculate upon such a contingency. The judgment of the Privy Council is binding upon the Court of Arches, and for the reasons I have mentioned I think it is equally binding on this court. As the judgment of the Court of Appeal in ecclesiastical causes, it has the authority of law, and every clergyman of the Church of England is bound as a loyal subject to obey that in common with any other branch of the law of the land.

I cannot help repeating my regret that I should stand alone in this court upon a subject of such general importance, and that circumstance makes me feel considerable diffidence; but having given my best consideration to the case, I am unable to concur with the views of my learned brethren, and am constrained to say that in my judgment no excess of jurisdiction has been committed, and that this rule ought to be discharged.

MELLOR, J. At the close of the argument in this case I was prepared to concur with my Lord Chief Justice in making the rule absolute; but my Brother Lush then expressing his dissent from that course and requiring time to consider the matter further, we parted without appointing any time for meeting to give our judgment. As the Circuits were then immediately about to take place, I did not think it likely that we should be prepared to give judgment before the next sittings, and it is only within the last three days that I became aware that we should be able to meet for the purpose of delivering judgment. I do not mention this by way of objection or complaint, as I think it is extremely desirable that the matter should not be postponed to the sittings in

(1) Law Rep. 4 P. C. 301.

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November. I say it merely by way of excuse for not being prepared with a judgment of my own. I have been so incessantly occupied in the performance of other judicial duties that I have found it utterly impossible to abstract the necessary time from the consideration of other pressing cases. I have, however, had the advantage of receiving in portions during the last three days a judgment prepared by my Lord Chief Justice, with whose view of the case, expressed to me at the time of the argument, I entirely concurred, and with whom I was then prepared to concur in delivering judgment. I have, as far as my opportunities have enabled me, considered his judgment; and, although I do not desire without further consideration to be bound by every reason which he has assigned for the conclusion at which he has arrived, yet I am perfectly satisfied to rest my judgment upon the reasons and authorities stated in his most learned and elaborate judgment. I have also had the opportunity of reading the judgment prepared by my Brother Lush. I cannot do otherwise than dissent from the conclusion at which he has arrived; but I am sure he will permit me to say that, in my opinion, his judgment does not grapple with the real difficulties of the case. There are two cardinal points at which I am at issue with him. The first is that he seems to consider that this Court, in the exercise of its high functions, is bound by the decisions of the Judicial Committee of the Privy Council, which were so often referred to during the argument. It is to be observed that the Privy Council have no original jurisdiction in questions of this description; their authority is simply appellate, and is merely a substitution for the former authority of the Delegates. It cannot be doubted, as it appears to me, that in this matter that High Court is as much subject to review by this Court, in the exercise of its authority, as the Court of Delegates was. The Judge of the Court of Arches was, no doubt, bound by those decisions, and could not have rightly acted contrary to their tenor; but in the exercise of our jurisdiction we are not bound to treat them as conclusive authorities on the subject, but are at liberty to consider the circumstances under which they were given and the authorities on which they were based.

My second difference with my Brother Lush consists in this—that I consider that the offence upon which Lord Penzance adjudi-

cated and passed the sentence now appealed against was a fresh and distinct offence against the laws ecclesiastical—I mean new and distinct from the offence for which he had been sentenced to suspension and payment of the costs by Sir Robert Phillimore when Dean of the Arches. It appears to me that Lord Penzance had no jurisdiction to adjudicate and condemn the defendant, Mr. Mackonochie, to a sentence of suspension applicable only to a definite and specific offence, without fresh letters of request from the Bishop of London, in whose diocese the offence arose. All the offences charged against the defendant were committed within the diocese of London, and might have been dealt with in the Consistory Court of the Bishop of London; and without letters of request from the Bishop of London the Arches Court of Canterbury had no jurisdiction to take proceedings in the matter. When, therefore, Mr. Mackonochie had been convicted and sentenced by a definitive sentence of the then Dean of the Arches, and had suffered the punishment assigned to such offence, that suit was at an end. He might be liable to a summary proceeding by way of contempt, and punished in the course prescribed by the statute of George III. by significavit and imprisonment, but it appears to me that in order to proceed for a fresh specific offence, which might end in a sentence of suspension and deprivation, it was essential that a new suit should be instituted, and that fresh letters of request should have been obtained from the Bishop of London. There is no analogy in the law in criminous matters by which, when a new offence has been committed by a defendant, he can be called upon to answer without the institution of a fresh suit, conducted with the formalities which the law prescribes. It might as well be said that a man who has committed a burglary, and been sentenced, and suffered his punishment for such offence, and afterwards committed a fresh burglary in the same house, could be dealt with summarily, and tried and punished without any bill being preferred before a grand jury for such second offence. Possibly the monition given by Sir Robert Phillimore on the trial for the former offence might be used in aggravation of punishment on a second trial for a similar offence, but, as it appears to me, could have no other effect. That the conduct of Mr. Mackonochie is deserving of the highest censure for remaining in a church the

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law and discipline of which he habitually disregards may be true; but that is not ad rem to the present question, and it is our duty to prohibit a course of proceeding before a tribunal which has no authority by law so to proceed. Had the proceeding been simply irregular, that would have afforded no ground for the exercise of our extraordinary jurisdiction, as irregularity by a Court having general jurisdiction is no ground of prohibition, but of appeal. I do not intend, and indeed am not able, to follow these differences further; but I refer to them out of respect to my Brother Lush, that he may see that I consider I have grounds of difference with him which are of essential importance to our judgment in this case.

COCKBURN, C.J. This was an application to this Court for a writ of prohibition to prevent the execution of a sentence of the Dean of the Court of Arches, suspending the defendant ab officio et beneficio, as incumbent and perpetual curate of the parish of St. Alban's, Holborn, for the term of three years, for contumacy in disobeying two monitions of the Court, of the 26th of July, 1875, and the 29th of March, 1878, admonishing him to abstain from wearing certain vestments while officiating in the communion service; from causing the prayer or hymn commonly called the "Agnus" to be sung during the reception of the elements by the communicants; from making the sign of the cross to the congregation during the administration of the communion; and from kissing the Prayer Book during divine worship and the communion service. The suit against the defendant in respect of this departure from the established ritual, as an offence against the ecclesiastical law, had been originally instituted under the Church Discipline Act, 3 & 4 Vict. c. 86, in the Consistory Court of the Diocese of London, on the complaint of the promoter, Mr. Martin, as promoting the office of the judge, and had been sent by letters of request from the Bishop of London to the Court of Arches. On the 7th of December, 1874, Sir Robert Phillimore, then the Dean of the Court of Arches, by an interlocutory decree, having the force of a definitive sentence, pronounced the defendant guilty of the offences charged against him, and sentenced him to suspension ab officio for six weeks; to which sentence the learned

judge superadded a monition to desist from the practices thus condemned as unlawful. On the 12th of June, 1875, a monition was issued under the foregoing decree, admonishing the defendant as stated, which monition was duly served on the defendant. On the 23rd of March, 1878, application was made by the promoter to Lord Penzance, who had succeeded Sir Robert Phillimore as Dean of the Arches, alleging disobedience on the part of the defendant to the monition of the Court, and praying that obedience thereto might be enforced. Satisfied by the affidavits adduced in support of the application, Lord Penzance declared that the defendant had disobeyed the monition of 1875, and thereupon further admonished him to abstain from the practices in question. A monition was accordingly issued on the 29th of March, 1878. On the 20th of April ensuing, a similar application was made to the learned judge, by motion, on affidavits shewing continued disobedience, and asking that the monitions might be enforced in such manner as to the Court should seem meet. Notice of this motion having been served, but the defendant failing to appear, Lord Penzance on the 11th of May decreed that the defendant had disobeyed the monitions of the 12th of June, 1875, and the 29th of March, 1878, and for his disobedience therein declared him "to have been guilty of contumacy," and "for his conduct aforesaid" sentenced him to be suspended ab officio et beneficio for the term of three years, condemning him also in the costs of suit.

I have been the more particular in stating the proceedings thus far in detail, because it was insisted by the learned Solicitor-General, in shewing cause against the rule, that the sentence pronounced by Lord Penzance was not founded on the defendant's contumacy, but was only an enforcement of the former judgment of the Court. When the language of Lord Penzance is looked at, this is obviously an error. The sentence is founded expressly and exclusively on the alleged contumacy; nor could it have been otherwise; there could not possibly have been a sentence in respect of the fresh offence as such without a fresh suit. It is against the execution of the sentence thus founded on disobedience to the monition that the present application is made to this Court. For the reasons I am about to state, I am of opinion that the monitions both of Sir Robert Phillimore and of Lord Penzance were ultra

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vires and inoperative, and that the sentence of suspension pronounced by the latter, and by which Mr. Mackonochie has for the time been deprived of his benefice, cannot be upheld, and, consequently, that the rule for a prohibition must be made absolute.

In the first place, I must say I entertain the gravest doubt whether the decree of Lord Penzance on the first application to him and the monition of the 29th of March were not altogether ultra vires. The monition of Sir Robert Phillimore formed part of the definitive sentence pronounced in the original suit. If it had not done so, and no monition had then been given, I apprehend that the suit, which had thus been brought to an end, and in which the defendant had been condemned and had undergone his punishment, and had paid the costs, could not have been resuscitated in order to append to the sentence, on a new state of facts subsequently arising—in other words, on a new offence having been committed—something which had formed no part of it as pronounced, for the purpose of reaching such new offence summarily, instead of proceeding against the offender as for a substantive offence. I do not, however, desire to base my judgment on this ground. I am disposed to think that if a monition thus appended to a sentence for a specific offence can be made the foundation of a summary proceeding for contempt on the commission of a further offence, the monition of Sir Robert Phillimore was still sufficiently alive for that purpose. It seems to me that there are much stronger reasons for making this rule absolute.

I must premise what I have to say in support of the view I entertain of this case by stating that, taking the original monition to have been the foundation of the decree which we are asked to prohibit, the learned judge of the Court of Arches, after the decisions of the Judicial Committee of the Privy Council in the cases of *Martin* v. *Mackonochie* (1) and *Hebbert* v. *Purchas* (2), could not have done otherwise than as he did in treating the disobedience of the defendant as contumacious. The Judicial Committee having appellate jurisdiction over his own Court, it would have been inconsistent with the deference always paid to the decisions of a Court of Appeal to refuse to act upon the precedents which had been deliberately set—especially in the case of *Hebbert* v. *Pur-*

(1) Law Rep. 3 P. C. 409. (2) Law Rep. 4 P. C. 301.

chas (1)—by the appellate tribunal. We, on the other hand, are not bound by the decisions in question. On the contrary, we are called upon, I think, as matter of judicial duty, on such an application as the present, to review these decisions, and if necessary to the exercise of our prohibitive jurisdiction, to overrule them. For it is the province of this Court to restrain all tribunals not forming part of the High Court of Justice, or having appellate jurisdiction over it, within the limits of their respective jurisdictions; and among the tribunals so within its restraining authority are the Ecclesiastical Courts. Of these the Judicial Committee of the Privy Council, in its character of a Court of Appeal from these courts, forms a part, and is, therefore, as such—however high its position and authority in other instances—so long as it is exercising ecclesiastical jurisdiction, subject to our controlling jurisdiction by way of prohibition.

That this is so not only results from general principle, but is established by several decisions in which it has been deliberately held that a prohibition would go to Commissioners of Review, the highest Court of Appeal in ecclesiastical matters, as well as to the High Court of Delegates. The first is the case of *Parlor* v. *Butler*, in the 39th Elizabeth. (2) This was a suit for defamation before the High Commissioners. The Commissioners entertained the suit, but a prohibition was granted on the ground that the words were not of ecclesiastical cognizance. The next case was that of *Halliwel* v. *Jervoise* (3), a suit for tithes commenced in the Consistory Court. The defeated party appealed to the Court of Audience, where the sentence was affirmed; but on further appeal to the Court of Delegates, both sentences were reversed. Thereupon an appeal was preferred to commissioners appointed on a Commission of Review under the Great Seal, under 1 Eliz. c. 1. On an application to the Queen's Bench for a prohibition, the question turned on the validity of this commission, which was disputed on the ground that such a commission was inconsistent with the statutes of 25 Hen. 8, c. 20. But on a conference of all the judges, it was held that it was within the power of the Crown to issue such a commission, as the power of appeal on review,

(1) Law Rep. 4 P. C. 301.

(2) Moore, 460.

(3) Moore, 462.

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formerly exercised by the pope, had become vested in the Crown, and had not been taken away by the statutes of Hen. 8; but it was further agreed that if the commissioners proceeded otherwise than according to the law of England, a prohibition should go to restrain them. A later case is that of *Reeve* v. *Denny* (1), which was an administration suit commenced in the Episcopal Court of Norwich, and carried thence to the Court of Arches, where the sentence of the former Court was affirmed. An appeal having been brought in the High Court of Delegates, an application was made for a prohibition, the question being raised whether the Court of Appeal had jurisdiction to grant administration, and whether the cause must not be remitted to the Court below for that purpose. After argument a prohibition was granted. Next we have the remarkable case reported by Hobart under the name of *Hutton's Case* (2), the facts of which were as follows: Sir Timothy Hutton had presented one Rowth, as his clerk, to the Bishop of Chester for institution to a living, who, however, refused to institute him; whereupon Sir Timothy complained to the Archbishop of York, who sent a monition to the bishop to receive the clerk, or to appear before him and answer for not doing so; but the bishop did neither; whereupon the archbishop himself instituted the clerk, who was by his warrant inducted. In the meantime one King had been presented by the Crown, and he and the bishop brought a suit in the Court of Delegates to set aside the institution and induction of Rowth. Thereupon a prohibition was applied for in the Court of Common Pleas, of which Hobart was himself then Chief Justice, on the ground that induction was a temporal act, triable by temporal law, and the church being full could only be avoided by a suit of quare impedit or the like, at the common law, and a prohibition to the Court of Delegates was granted. This case is the more striking from the fact mentioned by Hobart, that complaint of this act of the Court was made to King James, who signified his pleasure that he would have the prohibition set aside and a consultation granted. "But," says the learned reporter, "We answered His Majesty by letter that we could not do it by the law; and in the end, after many passages to and fro, it was left, and so it

(1) Latch, 85. (2) Hob. 15.

stands." In another case reported by Hobart (1), one Searle "Parson of Heydon German," having been indicted and convicted of manslaughter, and having been allowed his clergy without being burnt on the hand owing to his being in orders, a suit had been instituted in the Consistory Court of London, to deprive him of his benefice by reason of such conviction. The suit was carried by appeal to the Court of Delegates. But while the Delegates were proceeding with it, Searle moved in the Common Pleas for a prohibition, which was granted. Hobart, who was at the time Chief Justice, gives the reason, namely, that though the conviction of a clerk for felony would suffice in the spiritual Court to "build a sentence of deprivation," in the present case Searle, having been allowed the benefit of clergy, had in fact been pardoned, and under 18 Eliz. c. 7, s. 2, which prohibited in such cases the delivery of the offender to the ordinary, as had been accustomed, could not be further corrected or called upon to make purgation in the spiritual Court. In Bacon's Abridgment, tit. "Prohibition," it is stated as law that the delegates may be prohibited when they exceed their authority or proceed in matters not properly within their cognisance. These authorities abundantly establish that the High Court of Delegates was subject to the prohibiting control of this Court. This being so, there can, I think, be no doubt that the same rule applies to the Judicial Committee, who have in all respects taken the place of the High Court of Delegates. The Act of 2 & 3 Wm. 4, c. 92, simply transfers the appellate jurisdiction of the Court of Delegates to the Privy Council, without conferring on the latter any higher authority or power than had been possessed by the Delegates. We, therefore, as it seems to me, should not be justified on an application for a prohibition, in dealing with a judgment of the Judicial Committee, to treat it as of higher authority than if it had been a judgment of the Court of Delegates.

Where we are dealing with a sentence of the Court of Arches, we ought not to allow precedents set by the Judicial Committee to stand in the way if we are satisfied that they were wrong.

Wherever we have prohibitive jurisdiction to prohibit, we are,

(1) Hob. 288.

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in my opinion, bound to exercise it ex debito justitiæ, and not ex gratiâ, or as mere matter of discretion. For though some difference of opinion has existed on this point, as appears from Bacon's Abridgment, "Prohibition B," yet such I take to be the effect of the answer of all the judges of England in the Articuli Cleri, in the 3 Jac. 1, as given by Coke in the Second Institute, p. 607, where they say that "prohibitions are not to be granted of favour but of justice;" and so it was held in *Serjeant Morton's Case* (1) and by all the judges of the King's Bench, in the case of *Woodward* v. *Bonithan* (2); and in that view, whatever may have been said by individual judges, I entirely concur. So that I cannot but think that to hold that the decisions in question are not to be reviewed, but are to be taken as conclusively binding upon us in dealing with this judgment of the Court of Arches, which Court is clearly within our power of prohibition, would amount to little less than a dereliction of judicial duty. I yield to no one in respect for the authority of the Judicial Committee of the Privy Council, or for the eminent members of it who took part in the decisions I have referred to, and I say unfeignedly that I feel all the responsibility and delicacy involved in the task of reviewing and overruling the decisions of such a tribunal—more especially as, in doing so, I have to deal with a branch of law with which, as a common law judge, I am, of course—though I have taken the utmost pains to make myself master of the authorities—less familiar; but I cannot allow these sentiments to lead me to shrink from a duty which, as a judge of this High Court, I consider myself bound to discharge. And I have the less hesitation in dealing with the judgments in question from the circumstance that the Judicial Committee had not the advantage of hearing counsel on behalf of the parties against whom they decided, or of having their attention especially directed to the procedure of the Ecclesiastical Courts; and it has always been considered that a decision pronounced against the side which has not been heard carries with it but little authority as compared with a case in which the arguments on both sides have been presented to the Court. In fact the question of jurisdiction

(1) 1 Sid. 65. (2) Sir T. Raym. 3.

involved in the present application was, juridically speaking, never discussed before the Judicial Committee at all.

I shall presently give my reasons for holding the proceeding in the former cases of *Martin* v. *Mackonochie* (1) and *Hebbert* v. *Purchas* (2), to have been unwarranted by law, and for the conclusion at which I have arrived, that both the monition by Sir R. Phillimore, as well as that by Lord Penzance, as also the sentence of suspension founded upon them, the execution of which we are now asked to prohibit, were ultra vires and bad in law. But I cannot give effect to the contention of the counsel for the applicant that a suspension a beneficio is beyond the competency of an Ecclesiastical Court, as being a dealing with the freehold. There can in this respect be no difference between suspension and deprivation; and, as we know, deprivation a beneficio for ecclesiastical delinquency has in many instances occurred; and that the subject matter of this suit, the wilful departure from the ritual of the Church, as established by the rubric, the canons, and the Acts of Uniformity, was within the jurisdiction of the Court, cannot be disputed. It is true that the Common Law Courts have from the earliest times rigorously interdicted the Ecclesiastical Courts from exercising jurisdiction where the freehold was concerned; and there can be no doubt that the assertion of the power to deprive an incumbent of his benefice, as well as of his clerical office, was originally a usurpation on the part of the ecclesiastical authority. But the Common Law Courts declined to interfere, on the simple ground that the sentence of deprivation of the office carried with it of necessity the deprivation of the benefice, inasmuch as the clerical office gave the title to the temporal interest, and with the loss of the former all right to the latter was, as a necessary consequence, at an end. Thus Godolphin says (ch. xxvii. tit. Deprivation): "Deprivation is an ecclesiastical sentence, whereby an incumbent being legally discharged from officiating in his benefice with cure, the church pro tempore becomes void." Therefore where the right of presentation to a living had been obtained by a simoniacal contract, and the party after having been instituted and inducted had been deprived by the spiritual Court, it being urged, on an application for a

(1) Law Rep. 3 P. C. 409. (2) Law Rep. 4 P. C. 301.

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prohibition in the Queen's Bench, that it was not competent to a spiritual Court to meddle with the freehold, it was answered:—"True it is they should not meddle to alter the freehold; but here they meddled only with the manner of obtaining his preferment, which by consequence divested the freehold from him by the dissolution of his estate when his admission and institution are avoided": *Baker* v. *Rogers* (1). The sentence of deprivation a beneficio was thus only the expression of what followed as a necessary effect from the sentence of deprivation ab officio, a sentence admittedly within the jurisdiction of ecclesiastical tribunals.

Passing this by, and starting with the position as incontestable that a departure from the established ritual by a clerk in holy orders when officiating in public worship is an offence against the ecclesiastical law, which if made the subject of a suit properly instituted and conducted may be punished by suspension, I come to what is here the real question, namely, the efficacy of such a monition as has been issued in the present case—where the monition has been appended to a definitive sentence in a penal suit—as founding a sentence of suspension or deprivation on a summary proceeding for contumacy; which, again, as the two learned judges of the Arches Court have done no more than follow the precedents set by the Judicial Committee, involves the necessity of reviewing the decisions of the latter tribunal. Now I must begin by observing that prior to the decision of the Judicial Committee in the case of *Martin* v. *Mackonochie* (2), no instance was brought to our attention in which this summary jurisdiction, founded on a monition appended to a sentence in a penal suit, had ever been exercised. In *Hebbert* v. *Purchas* (3) the Judicial Committee caused a search for precedents to be made, but none could be found. Three or four cases were brought forward; but, as was admitted in the judgment, they totally failed to satisfy the purpose for which they were adduced, and it may safely be asserted that no such instance exists. Nor, in the numerous works on Ecclesiastical Law and the jurisdiction and procedure of the Ecclesiastical Courts, is there, so far as I have been able to ascertain, any mention of such a jurisdiction or procedure to be

(1) Cro. Eliz. 788.

(2) Law Rep. 3 P. C. 409.

(3) Law Rep. 4 P. C. 301.

found. I have gone carefully through, I believe, all the writers —certainly all the writers of authority—who have written on the subject of ecclesiastical jurisdiction and procedure since the Reformation, and I have not only not found any authority for the exercise of such a power, but not even a trace of it. Monition, indeed, as is well known, is a frequent incident in ecclesiastical procedure. To issue a monition and then to pronounce contumacious a party who set the process of an Ecclesiastical Court at defiance, or refused to obey its lawful order, and then to call in aid the statutory remedy, was, after excommunication, its earlier resource, had been done away with, the only means, except so far as modern legislation had come to its assistance, by which an Ecclesiastical Court could enforce its authority. But there is no mention made by former writers of a monition being superadded to a penal sentence for an ecclesiastical offence, and being thus made the means of exercising a summary jurisdiction over the offender in respect of a future offence. The first reference I find to such a jurisdiction is in Sir Robert Phillimore's recent work on Ecclesiastical Law, published subsequently to the two decisions of the Judicial Committee. Treating of admonition, the learned author says:—"Disobedience to this admonition assumes the grave character of contempt or contumacy, and is visited by a graver punishment." (1) And in another place he says:—"It is to be observed that when an admonition has been duly served, after a trial, upon the admonished person, disobedience to it entails the penalties incident to the contempt of the order of a lawful Court." (2) But, for neither of these positions does the writer cite any authority; and in so laying down the law I presume he is speaking on the strength of the two decisions I have referred to; and I am the more led to think so because I find no reference to any such position in his edition of Burn's Ecclesiastical Law. Certainly he must have been unaware of any authority for a sentence of suspension in such a case; for when, in a later part of his work, he is dealing with the subject of suspension, and has occasion to refer to the cases of Mackonochie and Purchas, he uses this significant language: "In two recent cases the Judicial Committee of the Privy Council thought themselves warranted by the law in inflicting

(1) Vol. ii. p. 1088. (2) Vol. ii. p. 1367.

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the punishment of suspension for disobedience of their orders;" to which however he adds: "But for these decisions, it would have seemed that these contempts of Court would be punished, as contempts of all Courts are, by committing, or in the case of Ecclesiastical Courts, signifying the offender." (1) It is pretty clear to my mind from this language that these decisions must have struck the very learned author as altogether novel, and as going a good deal further than he had been prepared to expect.

That down to the year 1849 deprivation or suspension as the punishment of contumacy was unknown to the Ecclesiastical Courts is perfectly certain from what took place in the case of the *Bishop of Lincoln* v. *Day* (2), a case to which I shall have occasion to refer more fully further on.

To get at the bottom of this question, as the foundation of any sound and satisfactory opinion, it becomes necessary to look a little more closely into the authority and procedure of the Ecclesiastical Courts; and it is all important to attend to certain distinctions which have frequently been lost sight of, and from inattention to which much confusion on this subject appears to me to have arisen. Ecclesiastical jurisdiction is divided into two main branches—civil and penal. Principles and rules of procedure applicable to the one will frequently be found inapplicable to the other. It is therefore important to observe that the suit in which the office of the judge is here promoted against the defendant is for an offence against the ecclesiastical law. Consequently we have to deal exclusively with the penal jurisdiction, except so far as the procedure in civil causes may throw light upon the subject of this inquiry. Now, the judicial authority capable of being exercised in respect of such offences was threefold—1, by the bishop at his periodical visitations; 2, by the bishop or his judge in the Episcopal Court, ex mero officio, if the bishop or his judge thought fit so to proceed; 3, on the office of the judge voluntarily promoted by a third party by the permission of the bishop. But between the exercise of these different forms of judicial authority an essential difference existed in respect of procedure. By the practice of the ecclesiastical tribunals, all causes are divided into summary and plenary. Where

(1) Vol. ii. p. 1377.

(2) 1 Rob. 724.

the jurisdiction is summary, all formality may be dispensed with. Where it is plenary, the formalities of procedure must be followed, and cannot be dispensed with. "Summary causes," says Conset (Practice, sect. 2, § 3), distinguishing them from plenary, "are such as respect not the solemn and ordinary way of proceeding in judgment, but require a summary and short proceeding, absque strepitu judicii et de simplici et plano." Such, it is agreed, may be the proceedings at an episcopal visitation, which may be conducted according to Ayliffe (Parergon, tit. "Visitation," p. 516), "sine figurâ judicii," all that is strictly required being that the party who is to be visited and punished for any offence or omission shall have an opportunity of being heard. So Comyns says (Dig. Visitor, C.), "the proceedings are to be 'summariè, simpliciter, et de plano, sine strepitu aut figurâ judicii.'" It will be important to bear this in mind further on. On the other hand, causes in which the office of the judge was promoted by a private individual were always plenary, and, as such, required to be conducted according to regular form. Oughton enumerates among plenary causes, "Causæ omnes correctionum ex officio voluntariè promoto" (Ordo Judiciorum, tit. vii. 12). "Negotium ex officio mero," he says, "est causa summaria, ex officio voluntariè promoto, plenaria." (Ibid. n. 2). "Notandum est," he says again, "quod omnes causæ correctionum, ex mero judicis officio institutæ, sunt causæ summariæ; saltem in iisdem solet summariè procedi, et ita est procedendum. Secus de officio voluntariè promoto. (Tit. 144, s. 9). Again: "Causa correctionis ex officio mero est causa summaria; causa vero correctionis ex officio voluntariè promoto est causa plenaria." (Tit. 150, n. 2). For which reason he says, "Eo modo procedendum est ut in cæteris causis plenariis." (Tit. 150, s. 3.) Where the cause was plenary, it was essential that all the formalities incident to a plenary cause should be observed. "Plenary causes," says Conset (Practice, pt. 1, s. 2), "are those which require a solemn order in the proceedings." "There must," he says, "be a formal citation to appear in the cause; the style of the Court must be observed; the names of the parties must be set forth. A time and place must be named for appearing. Articles must next be exhibited. Then comes the answer of the defendant; then the contestatio litis; and, if required, the oath of the defendant;

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then the proofs, with the opportunity for cross-examination; then the hearing, and finally judgment."

Assuredly there could be no relaxation as to these requirements in a penal suit. "In all causes of deprivation," says Ayliffe, followed herein by the other text writers, "where a person is in actual possession of an ecclesiastical benefice, these things must concur—viz., first, the person must be cited or admonished to appear; secondly, a charge must be given against him by way of libel or articles to which he is to give an answer; thirdly, a competent time must be assigned for proofs and interrogatories; fourthly, the person accused shall have the liberty of counsel to defend his cause; to except against witnesses, and to bring legal proofs against them; and, fifthly, there must be a solemn sentence read by the bishop after hearing the merits of the cause or pleadings on both sides; and these are the fundamentals of all judicial proceedings in the Ecclesiastical Courts in order to a deprivation; and if these things be not observed the party has a just cause of appeal, and may have a remedy in the superior Court." (Parergon, p. 209). Speaking of the articles necessary in such a suit, Sir Robert Phillimore (Eccles. Law, p. 1291) says, "The Court cannot go beyond the offence charged, nor the articles beyond the citation." And if these formalities are essential to a proceeding as founding a sentence of deprivation, so must they also be necessary to found a sentence of suspension, which, on all hands, the authorities agree in treating as a deprivation pro tempore.

Such being the former law, the Church Discipline Act, 3 & 4 Vict., c. 86, has intervened, prescribing the mode in which proceedings against persons in holy orders for offences against the ecclesiastical law shall be initiated, but leaving the former procedure of these Courts unaltered (see s. 13). What was before a plenary cause remains so still, and in it all the formalities incidental to a plenary suit must be observed. That that procedure has not been followed in the present instance is beyond controversy. The proceedings have been altogether of a summary character.

Let us next consider in what cases monitions have been used either as incidental to ecclesiastical procedure, or as matter of ecclesiastical censure and punishment in the way of definitive

sentence; for in one or other of these forms alone do monitions occur as incidental to such procedure; after which we shall have to consider in what way contumacious disobedience to such monitions has been dealt with according to established law and practice.

As incidental to procedure, monitions were frequently used, whether in a civil or in a penal suit, in order to compel the party proceeded against to do something necessary to the progress of the suit—as to appear; to answer to the articles; to appear to be examined on oath, or the like. Disobedience to such a monition became contumacy, and was treated as contempt of Court. As incidental to a definitive sentence, where the decree of the Court was not completed by the act of the Court itself, but required some act to be done by the party, a monition to do the thing decreed to be done was issued; and here again disobedience rendered the party contumacious. Thus, as Sir Robert Phillimore observes, (1) there might be a monition for alimony, or to churchwardens to hold a vestry, or to a clergyman to reside, or the like; so also to pay the costs if decreed. In short, a monition might be issued, to do anything which it was competent to the Court to order the party to do against whom the decree was directed, and if disobeyed rendered the party contumacious. But then how was such contumacy to be dealt with? In one way, and in one way only.

It is familiar knowledge that the only coercive process or punishment for contumacy possessed by the Ecclesiastical Courts was, prior to 53 Geo. 3, c. 127, excommunication, which when "signified" (as it was termed) to the Court of Chancery, was followed by the writ de excommunicato capiendo, confirmed and regulated by the statute of 5 Eliz. c. 23, under which the party was committed to prison till he made his submission and rendered obedience. For this process, by the Act of 53 Geo. 3, was substituted the writ de contumace capiendo, under which a party decreed to be contumacious might be imprisoned till submission and obedience; to which was added, by 2 & 3 Wm. 4, c. 93, power to sequester the estates of contumacious persons privileged from arrest, and who were not, therefore, subject to the process in question.

(1) Vol. ii. p. 1257.

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Thus the Ecclesiastical Courts Commissioners say: "The execution of the sentence, in case there be no appeal interposed, is either completed by the Court itself, as by granting probate or administration, or signing a sentence of separation; or remains to be completed by the act of the party, as by exhibiting an inventory and account, by payment of the tithes sued for, and other similar matters, in which case execution is enforced by the compulsory process of contumacy, significavit, and attachment."

The law is fully stated in Dr. Stephens's very learned and useful Treatise on the Laws relating to the Clergy, under the title "Excommunication." "By the ancient practice of the Ecclesiastical Courts," he writes, "it was only by means of an excommunication that they were able to enforce their sentences in any case whatever. So here the common law stepped in to their assistance; for in case of the refusal of the party to submit to his sentence, and being thereupon excommunicated as for a contempt, a writ de excommunicato capiendo was issued, under which he was to be taken and committed to the county gaol till he was reconciled to the church, and such reconciliation certified by the bishop. But now, by statute 53 Geo. 3, c. 127, s. 2, excommunication in all cases of contempt is discontinued, and in lieu thereof, where a lawful citation or sentence has not been obeyed, the judge shall have power, after a certain period, to pronounce such person contumacious and in contempt, and to signify the same to the Court of Chancery; whereupon a writ de contumace capiendo shall issue from that Court, which shall have the same force and effect as formerly belonged in case of contempt to a writ de excommunicato capiendo." Thus, in *Reg.* v. *Baines* (1) it was held that in a civil suit in an ecclesiastical court, judgment being given that a party shall do a given thing—as, e.g., pay a given sum for church rate—a monition may issue, and a writ de contumace capiendo may follow upon it, as the proper process, where contumacy occurs, either as incidental to procedure or by disobedience of a lawful order of the Court.

That being so, was there anything to alter the process in the case of a clerk in orders? Could suspension be resorted to in such a case as a means of overcoming the contumacy and en-

(1) 12 A. & E. 210.

forcing obedience? I apprehend assuredly not. The process is spoken of as being, and I see no reason whatever to doubt was, the same, whether directed against a layman or a clerk in orders —the clerk in orders not being in this respect in a less favourable position, except when subject to the visitatorial authority of the bishop. Suspension is not mentioned by the ecclesiastical authorities as a proceeding to which a clerk is liable by judicial sentence as a means of coercion as distinguished from punishment, as will be seen on referring to the title "Suspension" in the standard works on ecclesiastical law. "The mode of enforcing all process," say the Ecclesiastical Courts Commissioners, "in case of disobedience is by pronouncing the party cited to be contumacious; and if the disobedience continues a significavit issues upon which an attachment from Chancery is obtained to imprison the party till he obeys." The writers on ecclesiastical law are agreed in saying that, except that where the powers of the Courts have been enlarged by statute, as in the case of simony, non-residence, and the like, the only means of enforcing the decrees of the Ecclesiastical Courts, whether interlocutory or definitive, and whether in a civil or criminal suit, was by the writ de contumace capiendo.

And here I have to observe that in the instances in which a definitive decree thus requires for its completion an act to be done by the party, and a monition to do it issues, the suit in which this occurs is, with one or two exceptions, in the nature of a civil proceeding, or has reference to some obligation or duty which it is the object of the suit to enforce, and the performance of which it is competent to the Court to enjoin. Penance, to which I shall presently refer, affords such an exception. Non-residence would appear to lie on the confines of the civil and penal jurisdictions. If the suit is brought simply to enforce residence, monition would be proper, and would carry with it the statutory consequences of contumacy, and no other. If non-residence is made the subject of a suit with a view to deprivation or suspension, the suit becomes a plenary one, and cannot be disposed of summarily as a case of contumacy. I find no instance of such a proceeding, by way of anticipation, followed up by process for contempt, in a suit in pœnam in respect of an offence committed against the ecclesiastical law.

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Nor could it well be otherwise. No one has a right to presume, where an offence has been committed, that the offender, having undergone his punishment, will again offend; still less could a court of justice, unless authorized by established practice or by statute, on such an assumption arrogate to itself the power, if the offence should be repeated, to withdraw it from the ordinary course and procedure of law, and to make it the subject of a summary proceeding as amounting to contumacy.

The case is still stronger when looked at as one in which monition is resorted to, not as a means of furthering the progress of a suit—for which purpose it would be equally available in a penal as in a civil suit—or as a means of compelling the performance of a duty under a decree in a civil suit—but as a definitive sentence in a penal suit. Punishments, or, as the civilians term them, "Censures"—"censuræ, sive coercitiones ecclesiasticæ"—according to Sir Robert Phillimore, following herein the writers who have preceded him, are, as regards those to which both clergy and laity are subject in common, as follows:—1, Admonition, otherwise called Monition; 2, Penance; 3, Suspension ab ingressu ecclesiæ; 4, Excommunication, with the spiritual and temporal consequences incident to it. Those to which the clergy alone are subject are:—1, Suspension; 2, Sequestration; 3, Deprivation; and 4, Degradation. "Of these," says Sir Robert Phillimore, "admonition or monition is the first and lightest form of ecclesiastical censure, whether to clergymen or laymen." It is obvious that here "monition" is spoken of, not as the foundation of any ulterior consequences, but as a form, however mild, of punishment—the open and public censure or rebuke of the judge for ecclesiastical misconduct—generally accompanied by the party thus censured being condemned in costs—and to be remembered, doubtless, as matter of aggravation should a repetition of the offence occur—but not as capable of being used as the foundation of any future proceeding of a summary character on the score of contumacy in case of such repetition. And this for two reasons—first, that any repetition of the offence would in itself constitute a substantive and distinct offence; second, that constituting a substantive offence, the offender, where the suit was instituted by a prosecutor promoting the office of the judge, could only be proceeded against

in a plenary suit—that is to say, a suit in which a formal citation must be served, articles exhibited, and all formalities strictly observed—a summary proceeding in a penal suit, otherwise than as matter of process, being altogether unknown to and contrary to the spirit of ecclesiastical procedure. Nor, as I have before observed, has the Church Discipline Act abated anything of the formal requirements of the Ecclesiastical Courts in a penal suit. Section 13 leaves the procedure precisely as it was before. It introduces no abatement of its rigour in respect of the formalities previously required in a penal suit.

And here an observation presents itself, which it will be important to bear in mind. It is nowhere said, nor does it appear, so far as I am aware, to have occurred to any of the writers on ecclesiastical law, that of these different forms of ecclesiastical censure or punishment, from monition to excommunication, a second can be superadded to a first; still less that when once a definitive sentence has been pronounced, and a specific punishment awarded, the judge is not functus officio and the judicial authority exhausted, as is the case on the trial of an indictment in a court of common law. I am strongly disposed to think that monition, as made part of, or appended to, a definitive sentence, with the view of treating disobedience thereto as contumacy, has been adopted in these recent instances from its use in the procedure or civil jurisdiction of the Courts, the distinction between civil and penal jurisdiction not having been always kept sufficiently in view. Monitions thus appended to a sentence in a penal suit may have had for their purpose to warn the parties that after such a monition the offence, if repeated, would be treated as of an aggravated character; just as it is common for a judge in passing sentence on a convicted criminal to warn him that a heavier sentence will follow on a future conviction. That such would properly be the effect of such a monition is undoubted; but it is obviously a very different thing to say that the renewal of the offence can be dealt with summarily as a contempt of Court. There is no authority or precedent prior to the recent instances for such a course of proceeding. The subject of monition, as also that of contempt or contumacy, is fully discussed by the civilians. Nowhere is it said that a monition can be superadded and appended to a definitive sentence in a penal

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suit, so as to enable a subsequent offence to be treated summarily as contumacious. Suspension is, as might be expected, amply dealt with. But nowhere is it said that suspension ever has been or can be inflicted as a punishment for contumacy in disobeying a monition in a penal suit in which the office of the judge has been promoted by a third party. It is possible that the notion that suspension might follow on a monition may have had its origin in the doctrine of the early canonists, that when in the exercise of the visitatorial power the bishop inquires summarily into clerical offences with a view to deprivation or suspension, a monition must precede the sentence. (See Gibson, Codex, p. 1046.)

Again, whatever the penalty to which a party pronounced contumacious for disobedience of an order of the Court was liable, such penalty was not treated as in the way of punishment, but as a means of overcoming the contumacy and enforcing obedience, and was only imposed *quousque*. It ceased on submission and obedience. The party in contempt could not be summarily condemned to punishment for a definite period independently of future submission.

A striking illustration of the position that even in a penal, as well as in a civil suit, the only means of enforcing their decrees which the Ecclesiastical Courts possessed, except where their powers had been enlarged by statute, was derived from the statutes I have been referring to, is to be found in an instance in which, in a penal suit, the decree was not completed by the act of the Court but something was required to be done by the party against whom the decree was directed in order to carry it out—namely, in the instance of penance, which, as we have seen, is a form of ecclesiastical punishment, and which, though now obsolete, was formerly much in use as a punishment for certain offences. If the party enjoined to do penance refused to comply, the only mode of enforcing obedience mentioned in the books, whether against layman or churchman, was by excommunication, or in later times, by the writ de contumace capiendo. It is nowhere suggested that suspension or deprivation might be applied in such a case where the offender was a clerk in orders.

That deprivation or suspension were unknown to the Ecclesiastical Courts as a punishment of contumacy in the case of a clerk

in orders as late as the year 1849 is clear from what took place in that year in the Arches Court in the case of the *Bishop of Lincoln* v. *Day*. (1) The defendant, a beneficed clergyman, having been suspended ab officio et beneficio for drunkenness for three years, and further until he should produce and lodge in the registry a certificate of good conduct during that period, at the expiration of the three years resumed his clerical duties without exhibiting the required certificate. Being proceeded against for thus acting, he was pronounced to be in "contempt." Thereupon counsel prayed for a sentence of deprivation, but the Court (Sir Herbert Jenner Fust), though regarding the case as a most aggravated case of contempt, nevertheless, there being no precedent for the application of such punishment in a case of contempt, declined to pass that sentence for such an offence, and the decree was that the contempt should be "signified," so as to make the defendant liable to imprisonment under 53 Geo. 3. It is obvious from the language of the report that if there had been any authority for the sentence of deprivation or suspension in such a case, the Court would willingly have inflicted that punishment. But there was none, and the established process under the statute was consequently resorted to.

Before I quit this portion of the subject I have also to call attention to a very important distinction taken in the Act of 53 Geo. 3, between excommunication as incident to a civil suit, as a means of enforcing decrees, whether interlocutory or final, and excommunication as a form of punishment in a penal suit. While the Act supersedes the former, substituting for it the writ de contumace capiendo, it expressly preserves it "on definitive sentences, or in interlocutory decrees having the force and effect of definitive sentences, pronounced as spiritual censures for offences of ecclesiastical cognizance," limiting, however, its operation in such cases to a period of six months—thus affording a statutory recognition of the difference I have been adverting to between contumacy in the course of a suit, and any act amounting to an offence under the ecclesiastical law.

Thus far I have been dealing with the law as administered in a plenary penal suit in the Episcopal Courts. But, as has already

(1) 1 Rob. Ecc. 724.

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been observed, where the bishop dealt with offences of the clergy of his diocese—in which would be comprehended simony, non-residence, non-performance, or irregular performance, of divine service, heresy, false doctrine, profaneness, immorality, drunkenness, and the like—in his office of visitor at a visitation, in what has been termed his "forum domesticum," or where a proceeding was instituted ex mero officio, the case was altogether different. There the formalities required in a regular suit were not deemed necessary. There the bishop in the one case, or his judge in the other, might proceed summarily, subject, however, to the condition insisted on by the canonists, that, where the offence was one of omission, a monition should precede deprivation or suspension. Not, however, that, in a matter which amounted to an offence against the law or discipline of the Church, as distinguished from the non-performance of some duty which the bishop, as ecclesiastical superior, had power to enjoin, disobedience to the monition created the offence for which deprivation or suspension might afterwards be decreed. The definitive sentence was founded, not on the disobedience, but on the offence itself. The purpose and effect of the monition was practically to give a locus penitentiæ to the offender or party in default.

6 Moo P.C. 456.

Thus stood the law as administered by the Ecclesiastical Courts till the time when, within the last few years, the jurisdiction now exercised was for the first time assumed, I had almost said—I hope it will be understood not using the term in any offensive sense—usurped—not, indeed, by the judges of the ordinary Ecclesiastical Courts, but by judges of whom, however great and eminent, I hope I may be pardoned for saying that they may be supposed to be less familiar with the administration of ecclesiastical law—namely by the Judicial Committee of the Privy Council sitting on appeal. In the year 1868, in a case of *Martin* v. *Mackonochie* (1), the parties being the same as are before us in the present proceeding, a suit had been instituted in the Consistory Court of London against the defendant, a clerk in holy orders, and perpetual curate of the parish of St. Alban's, Holborn, for offences against the ecclesiastical law in the manner of administering the holy communion, namely, in the use of incense, the undue elevation of the

(1) Law Rep. 3 P. C. 409.

paten and cup, as also the practice of excessive kneeling and prostration before the consecrated elements during the prayer of consecration, the mixing of water with the wine, and the use of lighted candles during the celebration of the communion. The suit having been transferred by letters of request to the Court of Arches, the learned judge of that court decided that the defendant had offended against the ecclesiastical law in respect of the use of incense, the elevation of the paten and cup, and in mixing water with the wine used in the administration of the communion, and admonished him not to repeat these practices; but he declined or omitted to pronounce that the defendant had offended by the alleged kneeling and prostration, or by the use of lighted candles. The promoter having appealed to the Judicial Committee of the Privy Council against this judgment in respect of the two last-mentioned particulars, the Judicial Committee held that the respondent, the defendant in the original suit, had offended against the law ecclesiastical, within the meaning of the Uniformity Acts, in the particulars relating to the kneeling and prostrating himself before the consecrated elements during the prayer of consecration, and in the using of lighted candles during the celebration of the communion; and reported that the respondent, in addition to the admonition administered in the Court below, should be admonished to abstain from the practices so pronounced by them to be unlawful. An Order in Council to that effect was accordingly made, and a monition under the seal of the Court was in due course issued and served on the respondent. This judgment having been pronounced at the close of 1868, two years afterwards a petition was presented to the Judicial Committee praying them to enforce obedience to the monition, on affidavits shewing that the defendant still persisted in the practices against which he had been admonished. The defendant, the respondent in the cause, not appearing either by counsel or in person, their lordships, on the application of the appellant's counsel, made an order that the respondent and the witnesses who had made affidavits in his favour should appear on a given day to be cross-examined, which was accordingly done. The evidence having been taken, their lordships decided that the respondent had been guilty of disobedience to the monition, and sentenced him to be suspended ab officio for

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three months. (1) It is to be observed that, the respondent neither appearing in person nor being represented by counsel, no question was raised as to the jurisdiction thus invoked and exercised.

Two years later the case of *Hebbert* v. *Purchas* (2), a case in many respects similar to the foregoing, came before the Judicial Committee of the Privy Council on an appeal from the decision of the Court of Arches, so far as the judgment there had been favourable to the defendant, in a suit in which, being a clergyman in holy orders, he had been charged with various breaches of ecclesiastical law in the celebration of the communion, among other things as regarded the vestments worn by him during its performance, the position assumed by him during the prayer of consecration, as also in the use of wafer bread, and of an admixture of water with the sacramental wine. The judge of the Court of Arches having declined to pronounce against the defendant and to admonish him in respect of these particulars, the promoter appealed to the Judicial Committee, who, after argument, decided against the respondent in respect of these charges, and advised, as in the former case, that a monition should be issued admonishing him to abstain from such practices in future; and an Order in Council having been made accordingly, a monition was issued and served on the respondent. In the following year an application was made to the Judicial Committee, by a motion founded on affidavits shewing a continued use of the practices against which the defendant had been thus admonished, for a sentence of deprivation against him for his contumacy and contempt (3). In this case, notwithstanding the precedent set in the case of *Martin* v. *Mackonochie* (1), their lordships appear to have had some misgiving as to their power to pass sentence of deprivation or suspension for contumacy on motion, and desired to have further information regarding the exercise of such a power by the Court of Delegates, to whose powers they had succeeded under the Acts of 2 & 3 Wm. 4, c. 92, and 3 & 4 Wm. 4, c. 41; and they accordingly directed the motion to stand over for that purpose. Their Lordships having on a subsequent occasion been referred by counsel to

(1) Law Rep. 3 P. C. 409. (2) Law Rep. 3 P. C. 605.
(3) Law Rep. 4 P. C. 301.

certain alleged precedents, the Lord Chancellor Hatherley pronounced a judgment, as to which I can only say I think there must be some error in the report, as his Lordship, having first observed that "the researches of counsel have resulted in no such precedent being found—as indeed their Lordships had supposed would probably be the case"—having added that the Court was of opinion that it "could not proceed to enforce compliance with the order which had been disobeyed by any summary process for contempt through the medium of a motion," is notwithstanding made to say: "On the other hand, their Lordships are quite satisfied that there exists in this tribunal, as there did exist in the High Court of Delegates—all the powers of which have been transferred to this committee—a power of suspension, not only ab officio, but a beneficio also, as a summary punishment for contumacy;" having said which, his Lordship proceeds to pass sentence of suspension for a year in respect of the contumacy. Yet the only proceeding then pending before their Lordships, and on which this summary jurisdiction was exercised, was a summary application on motion. The suit, out of which the appeal had sprung which gave jurisdiction to the Judicial Committee over the defendant, had terminated in the suspension for six weeks and the twofold monition, which together formed the sentence—monition being, as we have seen, a form of ecclesiastical censure; and assuming even that disobedience to a monition of this nature would amount to a substantive offence against ecclesiastical law, which might be made the subject of a substantive charge in a fresh suit, no such charge was before the Judicial Committee: the only proceeding before it was an application to deal with a further and substantive offence summarily on motion. I am unable, if I may be forgiven for saying so, to follow the reasoning in the judgment in question. Precedent and authority being altogether wanting, we are left without any ground being assigned for the assertion that the Court of Delegates had before possessed, and therefore the Judicial Committee, as their successors now possess, the power of suspending a clergyman as a summary punishment for contumacy. So far as I am aware, no instance of the exercise of this power in a penal suit, prior to these judgments of the Judicial Committee, is anywhere to be found. And assuming even that the issuing of

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the monition was within the competency of the Court—which, however, I cannot admit—and that the defendant in disobeying it had been guilty of contumacy, the established and only penalty of contumacy was not suspension, but, as I have shewn, imprisonment under 53 Geo. 3. Moreover, it is not a question whether the Court of Delegates possessed such a power, but whether the courts of the first instance, the Consistory Court and the Court of Arches, possessed it. For, the authority and power of a Court of Appeal, however high its position, can be no greater, except as to correcting the judgment of the Court below, than those of the Court appealed from. It can annul the judgment, or can affirm it; or in some cases may reform it; but it can pronounce only the judgment which the Court below could and should have given. What required to be established, therefore, was, that the Episcopal or Archiepiscopal Courts possessed this power of suspending summarily for disobedience to a monition in respect of an offence against the ecclesiastical law. But for this neither authority nor precedent is to be found; nor, I venture to think, has or can any sufficient ground be given for asserting it, while there is, as I shall presently shew, very sufficient ground for maintaining the contrary.

The cases referred to in *Hebbert* v. *Purchas* (1) were again brought forward on the argument in the present case, but they fail to furnish any precedent or authority in support of the jurisdiction now in question. The case principally relied on is that of *Harrison* v. *Archbishop of Dublin* (2), which in the first instance came before the courts on a writ of prohibition, and eventually found its way to the House of Lords. (2) Harrison being the rector of St. John's, Dublin, had altogether omitted to perform divine service in the parish church. Summoned by the archbishop to attend at a visitation to answer for not performing divine service, he declined to appear, upon which he was suspended by the archbishop for contumacy. Hereupon he applied to the Court of Common Pleas in Ireland for a writ of prohibition; and, having been put to declare in prohibition, set forth that the rectory of St. John's had formerly been attached to the priory of the Holy Trinity of Dublin, and that when that priory had been

(1) Law Rep. 3 P. C. 409. (2) 2 Bro. P. C. 199.

suppressed by King Henry VIII. and the Deanery of Dublin established in its place, the rectory had by the king's gift been attached to one of the prebends of the cathedral; that, having been appointed a prebendary, he had acquired the rectory by right of his prebend; and that, so long as he continued to be a prebendary, the rectory being inseparable from the prebend, he could not be deprived of the rectory unless first deprived of his prebend; that as prebendary he was not subject to the visitation of the archbishop, and, therefore, was not subject to it in respect of the rectory, nor subject to be deprived of or suspended from the rectory, so long as he remained prebendary of the cathedral. This contention was overruled by the Court of Common Pleas in Ireland, as also on appeal by the Court of Queen's Bench in England, and lastly by the House of Lords. But it is to be observed that the sole question raised was as to whether under the special circumstances the living was subject to the visitatorial power of the archbishop. No question was raised as to the manner in which that power, assuming it to exist, had been exercised. The decision does not, therefore, in any way affect the present question. In a subsequent stage, however, the matter assumed a different form. Some years later, Harrison, who persisted in not performing service, was admonished by the archbishop, at a visitation, to extract, within a month of that time, a licence to serve the cure of souls, and to preach in the parish church of St. John's. Disobeying the monition, he was pronounced contumacious, and sentenced to be suspended. He appealed to the Court of Delegates, taking, in the first place, the same ground as before, as to the rectory of St. John's not being subject to the archbishop's visitation; but, in addition thereto, insisting that the proceeding had been irregular and void, because no articles had been exhibited against him or any proofs brought in. The Delegates rejected the appeal, and rightly. The first point had been settled by the decision of the House of Lords in the previous case; and, as regarded the second, it was established law that proceedings instituted by the ordinary ex mero officio, and, à fortiori, proceedings at a visitation, might be dealt with summarily. Articles and proofs, therefore, in a matter within the personal knowledge of the bishop, and within his immediate jurisdiction—as non-performance of divine service

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undoubtedly was—would be superfluous and unnecessary, and could not be insisted on. Here, again, no question was raised, nor was any decision pronounced, as to the power of the archbishop to suspend, whether before or after monition; the only questions involved being whether the rectory was within his jurisdiction and whether the proceedings were not void for irregularity.

This case, as well as three others to which I am immediately about to refer, were cited from a series of cases extracted by Mr. Rothery, the Registrar of the Court of Arches, from the records of the Court of Delegates, and printed by order of the House of Commons in 1868. (1) But it is to be observed that in these records neither the arguments of counsel nor the grounds of the decisions appear; and it is, therefore, impossible to say with certainty on what points these decisions turned. They are, therefore, of but little authority.

The case of *Higgins* v. *Archbishop of Dublin* (2) was precisely the same as the foregoing, except that the appellant appeared before the archbishop, and therefore was not declared contumacious for not appearing. Having, however, been ordered to procure a licence, as Harrison had been, he was suspended for contumacy in not doing so, and the sentence was upheld on appeal. The same observations apply to this case as to the foregoing. That a complaint of non-residence or non-performance of public worship is within the visitatorial authority of the Ordinary seems clear. "To whom," asks Sir Robert Phillimore, in the case of *Bishop of Winchester* v. *Rugg* (3) (a case of non-performance of divine service) "are the parishioners to look for redress for this wrong done to them? How are they to obtain the performance of divine service in their church? Surely by an appeal to the authority of their bishop. He has the cura curarum animarum within his diocese. It is his bounden duty to enforce in every church in his diocese the performance of the services prescribed in the Book of Common Prayer. I see no reason to doubt," the learned author goes on to say, "that the general authority of the ordinary in matters of this kind, recognised by the universal ecclesiastical law as inherent in the nature of his office and necessary for the performance of the

(1) No. 135. (2) No. 136. (3) Law Rep. 2 A. & E. 252.

duties which are cast upon him, is properly applied to a case of this kind."

Another case referred to was that of *Boughton* v. *Archbishop of York* (1), which again, was an appeal from the exercise of episcopal authority. Boughton, a vicar choral of the Cathedral of York, having absented himself from the discharge of his duties, the dean and chapter appointed a substitute, and sequestered the revenue of the office for his use; upon which Boughton gave notice to the receiver not to pay the substitute. For this the dean and chapter called upon him to make a suitable apology, and on his refusal, suspended him until he should comply. On appeal to the archbishop as visitor, the sentence of the dean and chapter was confirmed. A further appeal to the Court of Delegates was attended by a like result. This, again, was an instance of visitatorial authority summarily exercised in foro domestico. The cases, therefore, which have arisen on the exercise of visitatorial jurisdiction are beside the present question, when we are dealing with a jurisdiction in which the formalities required by strict law have to be complied with.

The case of Thomas Jones (2), rector of Llandyrnock, in the county of Denbigh, differs somewhat from the foregoing, inasmuch as the suit against him, for not reading the prayers in the accustomed place, had been instituted not by the bishop ex mero officio, but on the presentment of the churchwardens in the Consistory Court of the diocese. Having been monished to read the prayers in the accustomed place, the defendant had peremptorily refused to obey the monition. For this the bishop ordered him to shew cause why he should not be suspended ab officio. Not appearing to shew cause, he was suspended. On appeal the sentence was upheld by the Court of Arches, and afterwards by the Court of Delegates. But here the churchwardens were, beyond all question, the proper persons to present in respect of any irregularities in the performance of divine service, as fully appears from the statement of the law, as found under the title "Churchwardens" in Burn's Ecclesiastical Law, or in Dr. Stephens' Treatise on the Laws relating to the Clergy. The proceedings may therefore have been considered as instituted ex mero officio, and consequently as

(1) No. 134. (2) No. 63.

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not subject to the necessity of being strictly formal; nor does it appear that any objection was taken to the exercise of the episcopal jurisdiction in a summary form. These cases are, for the reasons I have already given, inapplicable to the question before us. I entirely concur with the Judicial Committee in thinking that none of them establish a precedent for the exercise of the summary jurisdiction in dispute.

That neither precedent nor authority is to be found for the existence of this jurisdiction prior to its recent exercise is, I cannot help thinking, a very strong argument against it. Nor do I feel the force of the observation that no instance has been found of its exercise being held to be unlawful. That no attempt has ever been made to exercise it will readily account for the fact that no instance of its rejection is to be found. I cannot help thinking that it is incumbent on those who assert and invoke a jurisdiction so unusual to give proof of its existence.

But it is not only that no authority or precedent can be found to support the summary jurisdiction thus exercised; a still more formidable objection is, first, that looking to its supposed origin, such a jurisdiction cannot in the nature of things exist, and secondly that, if it could, its exercise would be contrary to fundamental principles. As regards the first point, it is clear that the Court of Arches possesses no primary jurisdiction over offences committed within any other diocese than that of Canterbury, except so far as such jurisdiction is conferred by the letters of request from the bishop of the diocese within which the offence has been committed. But the letters of request are necessarily confined to the specific offence which is the subject-matter of the suit transferred; and, as I have already stated on the authority of Sir Robert Phillimore, the suit so transferred relates to the offence expressly set forth in the articles which form the subject of the complaint, and to that alone. Being confined to the specific charge thus articled, the letters of request, as it seems to me, do not and cannot confer jurisdiction in respect of any other offence committed beyond the sphere of the primary metropolitan jurisdiction, and any further offence so committed remains in that of the diocesan. It may, perhaps, be said that the bishop, having transferred the cause to the Court of Arches, transfers with it the

power to issue such a monition, and to punish for contumacy in disobeying it. But this assumes that the bishop's commissary would himself have that power in the Diocesan Court, in a suit in which the office of the judge is promoted by a third party, which remains to be proved, and which, as far as I can see my way, is not only not proved, but incapable of proof. A fortiori is it to be proved that the diocesan can thus, by transferring a specific cause, confer, as it were by anticipation, on the Metropolitan Court jurisdiction over offences not yet committed, and which are, therefore, not as yet within his own—a proposition which to my mind I must say involves a legal absurdity. Every one will agree that the diocesan cannot transfer his judicial authority to the Metropolitan Court generally, or ante rem natam. It is only when a suit has been instituted in respect of a specific offence that the jurisdiction can be transferred. When it is so transferred, the letters of request, and the suit thereby removed to the Metropolitan Court must be strictly confined to the charge contained in the articles. How then can they give jurisdiction in respect of an offence not yet committed? How, if the bishop sending the letters of request should before the second offence is committed be succeeded by another, can the latter be dispossessed of jurisdiction over the second offence? And what if the second offence should be committed within the limits of a different diocese? Would the transfer of the cause by the bishop of one diocese give the Court power to treat as contumacy an offence committed in another, the bishop of which might possibly have refused his sanction to a prosecution on account of the second, and thus enable one bishop to invade the province of another? Finally, I ask by what authority can an Ecclesiastical Court—whatever may be the stage of the proceeding—by reason of a suit having been instituted in reference to a specific offence, assume to itself, without statutory authority, a power to keep the party, for all time to come, in a state of *surveillance*, and as subject to a summary jurisdiction hitherto unknown to the ecclesiastical law? To what extent is this jurisdiction to be carried? Over what area of episcopal jurisdiction is it to reach? To what limit in point of time is it to endure?—considerations which would be important if the matter were made the subject of legislation, but which are left wholly at large in the

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exercise of this novel authority. I fail altogether to see how it can be competent to a bishop to confer on the Court of Arches, by way of anticipation, jurisdiction over offences to be committed in the future, and over which, as not being as yet in rerum naturâ, he has himself no authority. Be this as it may, I am of opinion that letters of request relating to a specific charge carry no such jurisdiction with them with reference to a future offence.

That the exercise of such jurisdiction would, in more than one respect, be inconsistent with general principles of penal jurisprudence will, I think, readily appear. In the first place, the difference between plenary and summary jurisdiction in the matter of criminal procedure is recognised and established in every system of penal jurisprudence, including, beyond all question, the law ecclesiastical; and no Court can, without legislative authority, take upon itself, ex proprio motu, to substitute the one for the other. Yet that is what has been done here. Every wilful departure from the established ritual in a member of the Church having the cure of souls is an offence against ecclesiastical law, and constitutes in itself a distinct and substantive offence, and not the less so because the offender may already have been guilty of the like offence. It is therefore obvious that a repetition of a first offence may be so treated. What reason can be given why it must not be so treated? But if it were so treated, the prosecutor promoting the office of the judge would in such a case have to go through all the formalities of procedure required in a plenary cause; and as I have shewn, a suit so instituted in respect of an ecclesiastical offence was, and still remains under the Church Discipline Act, a plenary cause; and, as we have seen, in a suit in pœnam for an ecclesiastical offence all the formalities of the criminal procedure must of necessity be observed. If a suit were thus instituted in respect of a second offence as a distinct and substantive offence, a citation with all its formalities would be necessary, and articles must be exhibited—and how much is involved in these requirements will be seen on consulting Oughton, tit. "Citation," or Burn's Ecclesiastical Law, tit. "Practice"—the defendant must have the opportunity of answering, and of being examined on oath, of traversing the facts, of demurring in point of law—in short, all the incidents of procedure

required by the established law and by the statute must be gone through, and any summary proceeding, such as treating the case as one of contumacy, would be out of the question. By what authority short of legislative enactment can a defendant be deprived of the right to insist on the observance of these formalities? Oh, but it is said, substantial justice has been done: the facts were fully proved, and the offence was the same as that of which the defendant had before been convicted; and, though this may have been, strictly speaking, an informal and possibly irregular proceeding, full opportunity was afforded him of being heard and making his defence as much as if all the formalities required in a plenary suit had been complied with. To which, at least out of Court, many persons will be disposed to add in thought, if not in word: "These Ritualists are very obstinate and troublesome, and this, being the shortest, is the best way of putting them down; there is no occasion to be over nice in dealing with them." It seems to me, I must say, a strange argument in a court of justice to say that when, as the law stands, formal proceedings are in strict law required, yet if no substantial injustice has been done by dealing summarily with a defendant, the proceedings should be upheld. In a court of law such an argument à convenienti is surely inadmissible. In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings in pœnam are, it need scarcely be observed, strictissimi juris; nor should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has the right to insist on them as matter of right, of which he cannot be deprived against his will; and the judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion. Though a murderer should be taken red-handed in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect, it is for the legislature to amend it. The judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but

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ancillary to the application of the substantive law and to the ends of justice, is as much part of the law as the substantive law itself. I cannot, therefore, concur in the view that because the defendant might have defended himself on this summary proceeding, or, if a formal suit had been instituted against him, must upon the facts necessarily have been condemned, therefore the proceeding in question was valid and ought to be upheld. Such reasoning has and can have no place in an English court of justice. It may be that this summary jurisdiction would be exceedingly useful in order to prevent erratic clergymen from setting the law at defiance, and retaining benefices in a Church, the rules and ritual of which they habitually disregard, if the legislature should think proper to create it. But its possible utility affords no justification for usurping it, and expediency is a new and I must say to me strange ground to assign for upholding the exercise of assumed judicial authority when it cannot be shewn to exist in point of law. If the effect of our decision will be to enable Mr. Mackonochie to continue to set the law at defiance, I shall greatly regret it; but I cannot allow any such consideration to operate in deciding, not whether rough justice may not have been done, but—what, after all, when looked at judicially is a dry question of law—whether the sentence we are asked to prohibit has been according to law. At the same time let it not be for a moment supposed that the law is not quite strong enough to deal with and punish such offences, if the right course be pursued. The only question is whether that course, so prescribed by law, may be departed from, and another, unknown to the law, substituted for it. It is obviously a very different thing to treat as contumacy the refusal or omission to do a specific thing which the Court has authority to enjoin, or to treat as such a substantive offence for which the law has itself provided the appropriate treatment. The law constitutes a given act an offence. As such it attaches to it a given punishment. But it prescribes a plenary course of procedure by which, if at all, the offence is to be brought home to a party charged with having committed it. If a Court having jurisdiction over the offence takes upon itself to substitute a different and more summary method of proceeding, surely this is to make the Court, as it were, supersede the law. What would be thought if without legislative

authority the judges were to determine that they would in future admonish all persons convicted and sentenced for larceny not to repeat the offence, and if they did so, were to deal with them summarily as for contempt, without the formality of an indictment or the verdict of a jury? What would be said if a man convicted of publishing a libellous work were admonished on sentence being passed on him, not to publish any other copy of the work, and on doing so were to be punished for contempt of Court? Yet in principle the innovation would be no greater than is involved in the proceedings adopted in the present case.

And here, let it be observed, the departure from the regular and formal procedure involves this substantial and serious disadvantage to a defendant. In a summary proceeding like the present the facts are proved by affidavit: such was the course pursued in the present instance. The witnesses are not examined vivâ voce, and consequently are not submitted to cross-examination, a part of our procedure deemed in our penal jurisprudence essential to the interests of justice. Upon what principle can a defendant be deprived of a proceeding so essential to his protection by the substitution of a summary for the regular and formal procedure?

Another grievance of which a defendant so dealt with may justly complain is that the power of appealing, if not on the facts, at all events on the law, which he would have had on a second suit, is by this summary mode of proceeding taken from him. Nor let it be said that the power of appealing of which he is thus deprived may not be of material advantage to him. The facts may not be precisely the same. The sentence in the first suit may have been so light as not to make it worth his while to go to the expense of an appeal. Even if he has appealed in the first suit, that will not preclude him from renewing his appeal on the second. Or, in some cases, he may take the appeal to a superior Court. Be this as it may, it is a right which ought not to be taken from him.

But this is not all. Another and a very serious difficulty presents itself. Every fresh departure from the established ritual being, as I have pointed out, like the repetition of any other offence against the law, a distinct and substantive offence, other

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promoters may, with the concurrence of the bishop in whose diocese such second offence may have been committed, institute a distinct and separate suit in respect of it. Or, even the bishop in whose diocese the second offence has been committed may himself institute proceedings ex mero officio in respect of it in his own court. In the first place, I take it to be clear that a bishop, in transferring the suit in respect of the first offence to the Court of Arches, does not thereby divest himself of his jurisdiction over any other like offence subsequently committed within his diocese, should he think proper to exercise it. Still less could the transfer of a suit by one bishop bind another, should a second offence be committed in a different diocese. Yet this summary jurisdiction, as here asserted, would reach the offender, so far at least as the authority of the Court of Arches extends, wherever the second offence might be committed, without affording him a ground of defence should a second suit be instituted against him in a Diocesan Court. This being so, how, consistently with the first principles of justice, can the defendant be made liable twice over, once for the fresh substantive offence, and also for contumacy in disobeying the monition not to repeat the offence in respect of which he had been originally condemned?

In addition to the objections thus resting on general principles, technical difficulties present themselves of a no less serious character. In the first place, as I have already pointed out, a definitive sentence in a penal suit terminates the suit and exhausts the authority of the Court. It is not competent, therefore, to a Court pronouncing such a definitive sentence, in the absence of established practice or statutory power, to append to it, by means of a monition, an injunction to abstain in future from a repetition of the offence, so as to give itself summary jurisdiction over the offender in all time to come.

In the second place, the letters of request, transferring only a specific charge, cannot, in my opinion, for the reasons I have already given, confer jurisdiction over an offence which has not as yet come into existence, or subject the party charged to the summary jurisdiction of the Metropolitan Court in respect of future offences not arising within the area of its authority as a Court of first instance.

As regards the effect of a monition, the difficulty is equally great. If taken as a definitive sentence in a penal suit, unlike a monition issued in a civil suit to enjoin performance of the thing decreed to be done, so as to subject the party admonished to the consequences of contumacy if performance is withheld, it operates, as has been shewn, as a punishment by way of censure, and entails no further consequences. If it is issued in the course of a suit, or with the view of enforcing a decree made in it, all the authorities agree that the contumacy could only be dealt with, before the statute of Geo. 3, by excommunication and its consequences; since that statute, by the writ de contumace capiendo.

Even if the doctrine of contumacy upon a definitive sentence could be transferred from the civil to the penal jurisdiction of the Ecclesiastical Courts, there is nothing that I can find to warrant the application of a more rigorous rule as to its consequences, or to make suspension, which it is admitted cannot be applied in a case of contumacy on a sentence in a civil proceeding enjoining a given thing to be done, applicable to a monition in a penal suit directing that a given thing shall not be done. The fact is, that monition, in the sense in which that term is used with reference to a definitive sentence in a civil suit, has no place as appended to a definitive sentence in a penal suit; and its introduction into the penal branch of ecclesiastical procedure has—I cannot help thinking, though I say it with the utmost deference—arisen from a want of attention to the essential difference which exists between these two branches of procedure.

It is laid down, it is true, as a rule, by the early canonists, as I have already mentioned, that monition should precede deprivation or suspension; no doubt for the purpose of preventing any too rigorous or arbitrary exercise of episcopal authority. But such a rule does not prevail in our Ecclesiastical Courts; as is plain from the fact that in this case no monition preceded the sentence of suspension pronounced by Sir Robert Phillimore; and though it is said that monition shall precede suspension, it is nowhere said that in a penal suit monition will suffice, without more, to found a sentence of suspension in respect of a second offence. It has indeed been suggested that contumacy in disobeying the lawful order of an ecclesiastical superior is in itself an offence, indepen-

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dently of any question of contempt. Conset seems to say so; but then he treats it as no longer the subject of summary jurisdiction, but as requiring formal proceedings; and he gives a form of articles applicable to such a suit: [Ecclesiastical Practice, pt. 2, ch. 2.] What would be the appropriate punishment is not said. Possibly, in such a case, suspension might be within the authority of the judge, or the case might come within the power to excommunicate the offender, kept alive by 53rd Geo. 3, and thus a punishment of six months' imprisonment might be imposed. But so far as relates to contumacy as matter of summary jurisdiction, the authorities are clear that the only penalty is that of imprisonment by the writ de contumace capiendo under the statute of Geo. 3. Lastly, it is to be observed that in the treatment of contumacy arising in the course of a suit, this statutory process was not designed for punishment, but for the overcoming of the contumacy: consequently as soon as the party contumacious submitted he was set free. It is therefore inapplicable to a case in which the contumacy, having arisen as to an accomplished fact, has become, so far as that fact is concerned, incurable.

The result then at which I arrive on the most careful consideration I can give to the subject is—1, that a monition in a penal suit, while if pronounced as a definitive sentence it carries with it no ulterior consequences, cannot be appended to a definitive sentence awarding a specific punishment, so as to prolong and enlarge the jurisdiction of the Court, and to warrant any further proceedings on a repetition of the offence as for contumacy; 2, that even if a monition could be so pronounced, disobedience would entail no other punishment than is provided by 53 Geo. 3. Consequently that suspension is inapplicable to such a case.

The only question which remains to be considered—and it is by no means the least important—is, whether the present case is one in which a prohibition should go. I quite agree that mere irregularity, or even mistake in point of law, though it may be sufficient to found an appeal, will not be sufficient to call for or warrant a prohibition. I agree with what was said by Mr. Justice Littledale, in *Ex parte Smyth* (1), namely, that "the only instances in which the temporal Courts can interfere by way of prohibiting any

(1) 3 A. & E. 724.

particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the Court." But it seems to me that we have here much more than irregularity or mistake, and that something has been done which is manifestly beyond the jurisdiction.

I take it to be too clear for argument that, although an inferior Court may have jurisdiction over a given subject-matter when arising within the local limits of its own jurisdiction, if it takes upon itself to deal with such a matter when arising beyond such limits, it acts without authority, and may be restrained by prohibition. Such I apprehend to have been the case here.

I have given my reasons for thinking that the jurisdiction of the Court of Arches was limited to the offence handed over to it by the Diocesan Court, and that consequently the Court of Arches had no authority to deal with a distinct and separate offence not comprehended in the letters of request, and arising beyond the local limits of its primary jurisdiction.

Furthermore, I apprehend that if a Court takes upon itself, without authority, to alter the course of its procedure, and to create a new offence, as was here done by superadding monition to a definitive sentence and converting a second and distinct act into the offence of contumacy instead of dealing with it as a substantive offence, there arises in this respect, also, an excess of authority which we are called upon to prohibit. Blackstone, in 3 Com. c. 7, speaking of the Writ of Prohibition, says, that "it may be directed to the Courts Christian, where they concern themthemselves with any matter not within their jurisdiction, or if, in handling matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England, as where they require two witnesses to prove the payment of a legacy: in such cases also a prohibition will be awarded." On the authority of the law as laid down by Coleridge, J., in the case of *Jones* v. *Jones* (1), Mr. Lloyd, in his Treatise on the Law of Prohibition, states that prohibition will lie in cases where the judge of an inferior Court transgresses the rules which ought to govern the proceedings of all courts, or is guilty of an irregularity which

(1) 17 L. J. (N.S.) Q. B. 170.

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amounts to an excess of jurisdiction, though the case may otherwise be within his authority. In this view of the law I entirely concur, and I think it is applicable here.

But the strongest ground remains to be stated. Treating the second offence of the defendant as an act of contumacy, the Court of Arches has applied to it a punishment which could not according to the ecclesiastical law, if I understand it rightly, be applied to a case of contumacy, by sentencing the defendant to suspension, instead of dealing with the case under 53 Geo. 3. The effect of this proceeding is to deprive him of his freehold during the period over which the sentence of suspension extends. Now, I take it to be clear that, where the law which a Court has to administer prescribes a given punishment as applicable to an offence, to vary that punishment, or substitute another, is a usurpation of jurisdiction. No one, I think, could say that if the Court of Arches had sentenced the defendant to a fine of 1000*l.*, and on nonpayment had sentenced him to be suspended for contumacy, such a sentence would not have been properly the subject of prohibition. But the only penalty which an Ecclesiastical Court can impose in a case which is properly one of contumacy is that of imprisonment under the statute of Geo. 3. By applying to the alleged contumacy the penalty of suspension, the sentence, if executed, will deprive, and as I think, wrongfully deprive, the defendant of his freehold interest in his benefice; and although, where a sentence of deprivation or suspension can be properly pronounced by the Ecclesiastical Court, this Court will not interfere, though the effect of such sentence will be indirectly to affect the interest in the freehold, yet where the sentence is not properly within the competency of such a Court, or applicable to the alleged offence, this Court becomes bound to protect the temporal interest by prohibiting the execution of the sentence.

The result is that, in my opinion, the monition of Sir Robert Phillimore, and, à fortiori, that issued by Lord Penzance, was ultra vires, and, consequently, that the subsequent proceedings before Lord Penzance, which terminated in the sentence of suspension for three years, were coram non judice, and the sentence of suspension inoperative and null; and that, even if this were not so, the

sentence of suspension, being inapplicable to an alleged case of contumacy, was one which the Court of Arches had no authority to pronounce. I am therefore of opinion that the rule for a prohibition must be made absolute.

I may observe, in conclusion, that we have not called upon the applicants to declare in prohibition, as, in consequence of the Court being divided in opinion, we might otherwise have done, because, the facts not being in dispute, the question is solely one of law, and as the parties, if advised to appeal, can, under the Judicature Act, go direct to the Appellate Court on an appeal against our order, it is better to leave them to do so, without the expense, inconvenience, and delay of a proceeding by way of declaration.

Rule absolute.

Solicitors for defendant (applicant): *Brooks, Jenkins, & Co.*

Solicitors for Lord Penzance, and complainant: *Moore & Currey.*

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—— *Rex* v. *Cumberworth* (3 B. & Ad. 108) not followed - - - - 187
See HIGHWAY.

—— *Rex* v. *Trustees of Wrexham Turnpike Road* (5 Ad. & E. 581) dissented from 368
See LOCAL BOARD.

—— *Reg.* v. *Sykes* (1 Q. B. D. 52) followed 374
See PUBLIC-HOUSE.

—— *Tayleur* v. *Wilden* (Law Rep. 3 Ex. 303) distinguished - - - 495
See PRINCIPAL AND SURETY.

—— *Watson* v. *Clark* (1 Dow. 336) commented upon - - - - 594
See MARINE INSURANCE. 3.

CERTIFICATE—Of shipmaster—Suspension 166
See SHIP AND SHIPPING.

CERTIORARI—Appeal upon case stated - 457
See SESSIONS.

—— Grantable, notwithstanding express words in statute - - - - 509
See OBSCENE BOOK.

CHANCERY DIVISION—Trial of action commenced in - - - - 19
See PRACTICE. 10.

CHARTERPARTY—Despatch money - 437
See SHIP AND SHIPPING. 2.

—— Reference to charterparty in bill of lading
See SHIP AND SHIPPING. 4, 3. [223, 534

CHILD—Under sixteen—Settlement of - 344
See POOR LAW.

CHEQUE—Stoppage of - - - 371
See ATTACHMENT OF DEBT.

CHOSE IN ACTION—Liability of debtor to assignee - - - - 569
See ASSIGNMENT OF DEBT.

COAL MINES REGULATION ACT, 1872 (35 *& 36 Vict. c.* 76), *ss.* 46, 51, *sub-s.* 6—*Notice to remedy Danger from accumulation of Water in adjoining Colliery—Failure to withdraw Workmen.*] By the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 46, if in any respect (which is not provided against by any express provision of this Act or by any special rule) any inspector find any mine to which this Act applies, or any part thereof, or any matter, thing, or practice in or connected with any such mine to be dangerous or defective, so as in his opinion to threaten or tend to the bodily injury of any person, such inspector may give notice in writing to the owner, agent, or manager of the mine, and shall state in such notice the particulars in which he considers such mine or any part thereof, or any matter, thing, or practice to be dangerous or defective, and require the same to be remedied, and unless the same be forthwith remedied the inspector shall also report the same to a Secretary of State. If the owner, agent, or manager of the mine objects to remedy the matter complained of in the notice he may within twenty days after the receipt of such notice send his objection in writing, stating the grounds thereof to a Secretary of State, and thereupon the matters shall be determined by arbitration, &c. If the owner, &c., fail to comply with the requisition of the notice, where no objection is sent within the time aforesaid—within twenty days after the expiration of the time for objection—he shall be guilty of an offence against the Act.—By the General Rules (non-compliance with which is an offence under the Act), s. 51, sub-s. 6: "If at any time it is found by the person for the time being in charge of the mine, or any part thereof, that by reason of noxious gases prevailing in such mine, or such part thereof, or of any cause whatever, the mine, or the said part is dangerous, every workman shall be withdrawn from the mine, or such part thereof as is so found dangerous. . . . The appellants were owners of a colliery in which was a perpendicular pit shaft at the same level as, and communicating with a similar shaft in an adjoining colliery, which did not belong to them. Notice was given the appellants by the district inspector of mines that an accumulation of water existed near to and in connection with their mining works, which was dangerous and tended to the bodily injury of the workmen employed therein, and requiring them "forthwith to remedy the matter." This accumulation of water was in the pit shaft of the adjoining colliery, and the appellants had no power to interfere with the water in it, but it was shewn that after the receipt

COAL MINES REGULATION ACT, 1872—*contd.*
of the notice they did not remove the men at work in their own pit shaft and colliery. The appellants having been convicted under the Act for failing to comply with the above notice:—*Held*, by the majority of the Court, Cockburn, C.J., and Mellor, J., that the conviction was wrong, for s. 46 only enabled the inspector to give notice in cases where the danger specified in the notice was one which could actually be remedied by the occupier of the mine, and not in cases where the source of danger was beyond their control; and that the only remedy under such circumstances was that given by s. 51:—By Lush, J. (dissenting) that the conviction was right, for s. 51 did not affect the power of the inspector to give notice under s. 46, and the appellants' inability to remove the danger was the only ground for an objection to be sent by them to the Secretary of State; and that not having appeared and stated the grounds of their objection, they had failed to comply with the provisions of the section. The Queen *v.* Spon Lane Colliery Company 673

COMPANY—*Poll, when duly demanded—"Holding Shares"—Holder of Proxies.*] A company was registered under the Companies Act, 1862, with the following articles of association. Article 64: "Upon all questions at every meeting a shew of hands shall in the first instance be taken, and unless before or immediately upon such shew of hands a poll be duly demanded such question shall be decided by such shew of hands." Article 67: "If a poll is demanded by shareholders qualified to vote and holding in the aggregate 2000 shares or more, it shall be taken in such manner as the chairman shall direct, and the result of such poll shall be deemed to be the resolution of the company in general meeting." Article 75: "Votes may be given either personally or by proxy." Article 79: "Any instrument appointing a proxy shall be in the following form:—I —— . . . . hereby appoint . . . . to be my proxy at the —— general meeting of the company . . . . . and to vote for me and in my name upon all questions before such meeting." Two vacancies arose among the directors, and there were four candidates, of whom the prosecutor was one. At the meeting for election a shew of hands was taken, when the prosecutor obtained the largest number of votes. A poll was then demanded by the deputy chairman, who was the holder of twenty shares only, but who held proxies for more than 2000 shares. At the poll the prosecutor was not elected:—*Held*, that a mandamus must be granted to admit the prosecutor as having been elected director by the shew of hands, for the poll was illegally demanded, as the holder of proxies was not a person holding shares within the meaning of Article 67. The Queen *v.* Government Stock Investment Company - - - - - 442

2. —— *Voluntary Winding-up—Stay of Proceedings in Action—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 85, 138—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 5.] Upon an application to stay an action brought against a company which was being voluntarily wound up, it appeared that the plaintiff had gone on with the action after notice of the winding up and an offer from the company to allow him to prove against

COMPANY—*continued.*
the estate for his debt and costs, if he would undertake not to proceed further:—*Held*, that on making the order to stay proceedings the plaintiff could not be allowed to add to his debt his costs of appearing upon the application. Rose & Co. *v.* Gardden Lodge Coal and Coke Company 235

COMPENSATION—Arbitration—Taxation of costs
See Lands Clauses Act. [1

—— For loss of office - - - 423
See Telegraph.

CONTRACT—*Condition Precedent—Acceptance of Tender with intimation that formal Contract shall be subsequently prepared.*] An intimation in the written acceptance of a tender that a contract will be afterwards prepared, does not prevent the parties from becoming bound to perform the terms in the tender and acceptance respectively mentioned, if the intention of the parties was thereby to enter into an agreement, and if the preparation of the contract was contemplated merely for the purpose of expressing the agreement already arrived at in formal language. Lewis *v.* Brass [C. A. 667

2. —— *Corrupt Consideration—Money promised to Agent or Employé to bias him contrary to his Principal's Interests.*] The defendants contracted to pay the plaintiff a commission for superintending repairs to be executed by them on certain ships belonging to the Great Eastern Railway Company. The plaintiff at the time of such contract being made was in a position of trust in relation to the railway company, having been employed by them as an engineer to advise them as to the repairs, and the contract between defendants and plaintiff was made in part in consideration of a promise that the plaintiff would use his influence with the railway company to induce them to accept the defendants' tender for the repair of the ships. The jury found that the contract, though calculated to bias the mind of the plaintiff, had not, in fact, done so, and that he had not in consequence thereof given less beneficial advice to the company as to the defendants' tender than he would otherwise have done:—*Held*, that the plaintiff could not maintain an action for commission under the contract, on the ground that, even although the plaintiff had not been induced to act corruptly, the consideration for the contract was corrupt. Harrington *v.* Victoria Graving Dock Company - - - 549

3. —— *Fraud—Principal and Agent—Secret Gratuity to Agent—Avoidance of Contract.*] Where a secret gratuity is given to an agent with the intention of influencing his mind in favour of the giver of the gratuity, and the agent, or subsequently entering into a contract with such giver on behalf of his principal, is actually influenced by the gratuity in assenting to stipulations prejudical to the interests of his principal, although the gratuity was not given directly with relation to such particular contract, the transaction is fraudulent as against the principal, and the contract is voidable at his option. Smith *v.* Sorby [552

—— Action founded on - - - 23
See Practice. 4.

CONTAGIOUS DISEASE—Sale of animals infected with - - - - - 150
See Sale of Goods.

CONTRIBUTION—To repair of turnpike road out of highway rate - - - 187
See Highway.

CONVICTION—Appeal against—Notice to justices
See Sessions. 2. [13

COSTS—Security for - - - 80, 324
See Practice. 3. 5.

—— Of arbitration as to lands taken under Public Health Act - - - - 446
See Local Board.

—— Taxation of, under Lands Clauses Act 1
See Lands Clauses Act. 1.

—— Taxation after payment - - 726
See Solicitor and Client.

COUNTER-CLAIM—Employer and Workman 481
See Employers and Workmen Act.

COUNTY COURT—Action remitted to - 6, 80
See Practice. 3, 10.

—— Right to costs under County Courts Act, 1867
See Practice. 4. [23

COUNTY COURT RULES, 1875 - - 215
See Attachment of Debt. 2.

COVENANT—*In Lease—Not to use demised Premises as a Beershop or Public-house—Sale of Beer by Retail to be consumed off the Premises—Breach of Covenant.*] A lease contained a covenant by the lessees not to permit any house that might have been erected on the land demised to be used as a beershop, or public-house, or any theatre, or public show, or exhibition.—The assignee of the lease carried on the business of a grocer and baker at a shop erected on the land demised. He obtained an Excise retail beer licence for the sale of beer to be consumed off the premises, and sold beer in pursuance thereof in his shop:—*Held*, a breach of the covenant. Bishop of St. Albans *v.* Battersby 359

CRIMINAL PLEADING—*Indictment for publishing Obscene Libel—Omission to set out Words charged as Obscene—Arrest of Judgment—Error—Defect not cured by Verdict.*] In an indictment for publishing an obscene book, it is not sufficient to describe the book by its title only, for the words thereof alleged to be obscene must be set out; and if they are omitted, the defect will not be cured by a verdict of guilty, and the indictment will be bad either upon arrest of judgment or upon error.—Judgment of the Queen's Bench Division (2 Q. B. D. 569) reversed. Charles Bradlaugh and Annie Besant *v.* The Queen [C. A. 607

DAMAGE—Remoteness of - - - 327
See Negligence.

DAMAGES, RECOVERY OF PROSPECTIVE—*Support from adjacent Land, Right to.*] In an action for injury to the plaintiff's land and buildings, by removal of lateral support through mining operations carried on by the defendant on his own land adjoining, it was found by a referee to whom the amount of damage was referred that, in addition to existing damage, there would be future damage to the extent of 150*l.*;—*Held*, by Mellor and Manisty, JJ. (Cockburn, C.J., dissenting), that such damage was recoverable in the action:

DAMAGES, RECOVERY OF PROSPECTIVE—*cont.*
—By Cockburn, C.J.: Inasmuch as, according to *Backhouse* v. *Bonomi* (9 H. L. C. 503), the damage was the gist of the action, only the damage actually accrued could be recovered in the action, and any further damage must be recovered when it actually occured in a subsequent action.—*Nicklin* v. *Williams* (10 Ex. 259) and *Backhouse* v. *Bonomi* (9 H. L. C. 503) considered. Lamb *v.* Walker 389

—— Obstruction of light - - - 178
See Easement.

DEBT—Assignment of - - - 569
See Assignment of Debt.

DEMURRAGE—Discharge of goods prevented by default of other consignees 223, 534
See Ship and Shipping. 4, 3.

DEPOSITION—Of witness unable to travel 426
See Evidence.

DEVIATION—Port of safety - - 582
See Marine Insurance.

DISCOVERY—Correspondence between plaintiff and third party - - - 356
See Practice. 6.

—— Instructions to Solicitor - - 315
See Practice. 7.

DISTRESS WARRANT—Necessary before order for imprisonment - - - 545
See Public-house. 3.

EASEMENT—*Light, prescriptive right to—Quantum of Enjoyment—Right not to be measured by purpose for which Light actually used—Damages.*] In an action for the obstruction of ancient lights, the judge directed the jury that they were to consider whether there had been a sensible diminution of light, so as to make the plaintiff's premises less available for the purposes of occupation or business, to which they were then, or *might thereafter*, be made applicable, and that the damages were to be estimated according to the diminution of value of the premises for such purposes:—*Held*, a right direction, on the ground that the purposes for which the premises had actually been used while the light had been enjoyed, were not the proper measure of the right: *Martin* v. *Goble* (1 Campbell, 320), dissented from. Moore *v.* Hall - - - - 178

2 —— *Lateral support of House by adjoining Soil—Twenty Years' uninterrupted Enjoyment—Presumption, how far affected by inability to prevent Enjoyment—Conversion of Dwelling-house into Factory—2 & 3 Wm. 4, c. 71, s. 2.*] In an action by the owners of a factory against the defendants for excavating the soil of an adjoining house in such a manner as to leave the foundation of part of the factory without sufficient lateral support, and thereby causing it to fall, it appeared that the two buildings had apparently been erected at the same time, and were estimated to be upwards of 100 years old. Both had been occupied as dwelling-houses until about twenty-seven years before the accident, but the plaintiffs' predecessor had then converted his house into a coach factory, removing the internal walls, and erecting a stack of brickwork which both served as a chimney stack, and supported the girders which had to be put up to sustain the floors. The defendants, in

EASEMENT—*continued.*

taking down the adjoining house and in digging cellars which had not previously existed, left a support for the chimney stack which proved insufficient, and it fell, drawing after it the entire factory:—*Held*, by the majority of the Court (Cockburn, C.J., and Mellor, J.), that the defendants were entitled to judgment, for first, no grant of a right of lateral support for the factory by the adjacent land could be presumed from the enjoyment of such support by the plaintiff for twenty years, inasmuch as the owners of this land never had any power to oppose the conversion of the dwelling-house into a factory, and had no reasonable means of resisting or preventing the enjoyment by such factory of lateral support from the adjoining soil, and for the same reason such support was not an easement which had been enjoyed for twenty years within the Prescription Act (2 & 3 Wm. 4, c. 71, s. 2), as it could not be said to have been enjoyed by a person claiming right thereto and without interruption.—By Lush, J., dissenting, that, after twenty years' enjoyment without physical obstruction of such support for the land with the factory upon it, it must be presumed that it had been enjoyed by virtue of some grant or agreement; that the mere absence of assent on the part of the adjoining owner was immaterial, and that the plaintiff was entitled to judgment. Angus *v.* Dalton - - - - - 85

—— Removal of lateral support—Right to prospective damages - - - 389
See Damages.

ECCLESIASTICAL COURT—Judge hearing cause in place other than that fixed by archbishop - - - - 46
See Prohibition. 2.

ELEMENTARY EDUCATION ACTS, 1870 AND 1873 (33 & 34 *Vict. c.* 75), *ss.* 74, 84, 90, *Second Schedule, Second Part* (36 & 37 *Vict. c.* 86), *Second Schedule—Personation—Passing of Resolution for application for School Board—Bye-law creating Offence.*] The Elementary Education Acts, 33 & 34 Vict. c. 75, s. 90, and 36 & 37 Vict. c. 86, second schedule, which impose a penalty for the offence of personating any one entitled to vote at the election of a school board, do not include the offence of personation at the voting for a resolution for application for a school board; and an Order in Council purporting to be made under the above Acts, and imposing a penalty upon any one guilty of such offence, is invalid. The Queen *v.* Sankey [379

EMBEZZLEMENT—*Venue.*] A clerk whose duty it was to remit at once to his employers in Middlesex all moneys collected by him as their clerk collected at York, on the 18th of April, a sum of money as such clerk, but never remitted any portion of it. On the 19th and 20th of April he wrote and posted from places in Yorkshire to his employers in Middlesex letters making no mention of the money so collected, and on the 21st of April he wrote and posted at Doncaster in Yorkshire to his employers in Middlesex a letter which was intended to make them believe that he had not then in fact collected the money in question. These letters were duly received by the employers in Middlesex:—*Held*, by Kelly, C.B., Field, Lindley, and Manisty, JJ., that the receipt of the

EMBEZZLEMENT—*continued.*

letter of the 21st of April in Middlesex was sufficient to give jurisdiction to try the prisoner in Middlesex.—*Held*, by Huddleston, B., contrà, that no part of the crime was committed in Middlesex, and that the prisoner was wrongly indicted in that county. The Queen *v.* Rogers [C. C. R. 28

—— Of rabbits by gamekeeper - - 131
See Animals, Wild.

EMPLOYERS AND WORKMEN ACT (38 & 39 *Vict. c.* 90), *ss.* 3, 4—*Proceedings taken first in County Court, and then before Justices—Res Judicata—Counter-claim.*] By the Employers and Workmen Act (38 & 39 Vict. c. 90), s. 3, "In any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such, the Court may . . . adjust and set off the one against the other, all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them as the Court may find to be subsisting, whether such claims are liquidated or unliquidated and are for wages, damages, or otherwise." By s. 4, "A dispute under the Act between an employer and a workman may be heard and determined by a Court of summary jurisdiction, and such Court for the purposes of this Act shall be deemed to be a Court of civil jurisdiction, and in a proceeding in relation to any such dispute the Court may order payment of any sum which it may find to be due as wages or damages—provided that the Court shall not exercise jurisdiction when the amount exceeds 10*l.*'—The appellant was employed as a spinner by the respondents, and was discharged for neglecting his work, the respondents refusing to pay him wages in lieu of notice. He took proceedings against them in the county court. At the hearing no counter-claim or set-off was filed or set up, but evidence was produced to shew that he had been guilty of negligence. A verdict for 3*l.* 10*s.* was given in his favour:—*Held*, that the respondents were not precluded from preferring a claim before justices against him for wrongfully and negligently damaging their materials, for the only matter decided by the county court was whether there was such negligence on his part as would justify his dismissal without notice. Hindley *v.* Haslam - - 481

—— - - - - - - 229
See Infant.

ENDOWMENT—With religious test - 693
See Mandamus.

EVIDENCE—*Deposition of Witness—Practice—Criminal Law—Statute* 11 & 12 *Vict. c.* 42, *s.* 17.] Pregnancy may create an "illness" within the meaning of 11 & 12 Vict. c. 42, s. 17, so as to give the presiding judge discretionary power to admit in evidence upon a criminal trial the deposition of a witness, duly taken, who owing to pregnancy is proved to be unable to travel. The Queen *v.* Wellings - - - - C. C. R. 426

—— Of filing bill of sale and affidavit - 555
See Bill of Sale.

—— Burden of proof in question of seaworthiness of vessel - - - - 594
See Marine Insurance. 3.

EVIDENCE—*continued.*
—— Of express malice in publication of libel 237
See Libel. 2.

EXCISE—Wine-dealer's licence - - 346
See Wine.

EXTRADITION ACT, 1870 (33 & 34 *Vict. c.* 52) *ss.* 2, 6—*Treaty incorporated with and limiting Operation of Act—No British subject to be surrendered—Treaty with Switzerland.*] By the Extradition Act, 1870 (33 & 34 Vict. 52), s. 2, Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, her Majesty may by Order in Council direct that this Act shall apply in the case of such foreign state, and may, by the same or any subsequent order, limit the operation of the order—and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.—By s. 6, where the Act applies in the case of any foreign state, every fugitive criminal of that state who is in, or is suspected of being in, any part of her Majesty's dominions,—shall be liable to be apprehended and surrendered in manner provided by this Act.—A treaty having been made between this country and the Swiss government under the above Act, which provided that no Swiss should be delivered up by Switzerland to the government of the United Kingdom, and no subject of the United Kingdom should be delivered up by the government thereof to Switzerland; and an Order in Council having been made, which directed that the Act should apply in the case of the treaty:—*Held*, that the treaty must be taken to be incorporated with, and to limit the operation of, the Act, and that no British subject in this country could be surrendered to the Swiss government. The Queen *v.* Wilson - - - 42

FACILITIES—Granted by railway company in order to divert traffic - - 134
See Railway Company. 3.

FELLOWSHIP—Mandamus to admit to examination for - - - - 693
See Mandamus.

FIRE—Insurance against - - - 173
See Insurance, Fire.

FIXTURES, TRADE—Shipbuilding premises 299
See Poor Rate. 2.

FOREIGNER—Residing without jurisdiction—Security for costs - - - 324
See Practice. 5.
—— Notice of dishonour of bill - - 514
See Bill of Exchange. 3.

FRAUD—Sale of animals infected with contagious disease - - - - 150
See Sale of Goods.
—— Contract obtained by secret gratuity to agent - - - - 549
See Contract.

"GAMING"—*Game of skill played for Money or Money's worth—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 17, *sub-s.* 1 — *Suffering Gaming on Licensed Premises.*] The appellant, a licensed person, suffered to be played on the licensed premises a game called puff and dart, the object in which is to hit a mark on a target with a small dart blown down through a tube. The players each contributed 2*d.* as entrance money, the total sum so contributed being applied to the purchase of a rabbit as a prize for the winner of the game:—*Held* (Cockburn, C.J., doubting), that the appellant was rightly convicted of suffering gaming on the licensed premises under 35 & 36 Vict. c. 94, s. 17, sub-s. 1. Bew *v.* Harston - - 454

GARNISHEE ORDER—Salary not yet payable—
See Attachment of Debt. 2. [215
—— Cheque given for debt - - - 371
See Attachment of Debt. 1.

GENERAL AVERAGE - - - 413
See Ship and Shipping. 5.

GROCER—Sale of wine by - - - 346
See Wine.

HEALTH (PUBLIC)—Costs of arbitration - 446
See Local Board. 1.
—— Right to pasturage by side of highway 376
See Local Board. 2.
—— Bye-law as to dismissal of officer - 368
See Local Board. 3.

HIGHWAY, INDICTMENT FOR NON-REPAIR—*Township, liability to repair.*] Upon the trial of an indictment against the township of A. for the non-repair of a highway within it, it appeared that A. was one of seven townships forming the parish of D. The parish itself had never repaired any highway, nor levied highway rates, nor appointed surveyors; each township having appointed its own surveyors, and levied its own highway rates. With the exception of the highway in question, and one other, each of the seven townships had from time immemorial repaired its own highways. The highway had always been repaired by the adjoining township of W., but there was no evidence of any consideration for such repair:—*Held*, that A. was liable, for it must be presumed that the repairs had been done by W. under some arrangement between the two townships, and such arrangement in the absence of sufficient consideration was not binding on W. The Queen *v.* Ardsley - - C. C. R. 255

HIGHWAY (TURNPIKE) — *Contribution to Repair of, out of Highway Rate*—4 & 5 *Vict. c.* 59, *s.* 1—*Failure to complete whole System of Roads authorized by a Turnpike Act.*] An Act of Parliament authorized trustees to establish a ferry and make certain highways in connection therewith. The trustees were likewise empowered to take tolls, out of the proceeds of which the ferry and roads were to be maintained. No limit of time was specified by the Act for the expiration of the trust. The Act also provided that, in case the works thereby authorized should not be executed within the space of ten years, all the powers and authorities thereby given should cease and determine, save only as to so much of the work as should have been completed within that time.—The trustees established the ferry, and made all the roads specified by the Act but one. The funds arising from the tolls becoming insufficient for the repair and maintenance of the roads so

HIGHWAY (TURNPIKE)—*continued.*
made, an application was made by the trustees to justices for an order for contribution to the repair of one of the roads so made out of the highway rate under 4 & 5 Vict. c. 59, s. 1:—*Held*, that the trust created by the Act was a turnpike trust, within the meaning of 4 & 5 Vict. c. 59; and secondly (on the authority of *Reg.* v. *York and North Midland Ry. Co.* (1 E. & B. 858)), that inasmuch as the Act merely authorized and did not compel the making of the roads thereby specified, and contemplated that all the works might not be executed, the construction of the whole system of roads authorized to be made was not a condition precedent to the roads that were becoming highways, and consequently that an order for contribution to the repair of the road in question might be made under 4 & 5 Vict. c. 59, s. 1.—*Rex* v. *Cumberworth* (3 B. & Ad. 108) not followed. THE QUEEN *v.* FRENCH - - - 187

HOSPITAL—Chartered before 1693 - 307
See LAND TAX.

HUSBAND AND WIFE—*Separation—Authority to pledge Husband's Credit.*] Where husband and wife separate by mutual consent, the wife making her own terms as to her income, and that income proves insufficient for her support, the wife has no authority to pledge her husband's credit.—Defendants, husband and wife, executed a deed of separation, by the terms of which the wife retained the income of property settled to her separate use on marriage. The husband covenanted to pay her 20*l.* a year towards the maintenance of three of the children of the marriage, and the wife covenanted to maintain these children until they were twenty-one, and not to apply for further assistance to her husband. The husband had kept up the annual payments of 20*l.* in accordance with the terms of the deed. Plaintiff sued defendants in the county court to recover the price of meat supplied to the wife after the separation, and the judge at the trial, on hearing the wife's evidence, found that her income was insufficient for her support, and ruled that she had authority to pledge her husband's credit for the price of the meat. On appeal:—*Held*, that this ruling was wrong, and that the wife, after the separation, had no implied authority to pledge her husband's credit. EASTLAND *v.* BURCHELL - - 432

ILLEGALITY—Corrupt payment to agent - 549
See CONTRACT. 2.

IMPRISONMENT—Default in payment of penalty
See PUBLIC-HOUSE. 3. [545

INCLOSURE—Road between allotments - 258
See RAILWAY COMPANY. 2.

INDICTMENT—Omission to set out words of libel
See CRIMINAL PLEADING. [607

INDORSEMENT—Special, on writ - - 8
See PRACTICE. 13.

INFANT—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 4—*Validity of Agreement—Power of Employer to terminate Contract.*] Under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), which enables a dispute between an employer and workman to be heard and determined by a Court of summary jurisdiction, an

INFANT—*continued.*
agreement, by which an infant undertakes to serve an iron shipbuilder and boilermaker as plater and rivetter for a term of five years at weekly wages, with a proviso that—should the employers cease to carry on their business, or find it necessary to reduce the operations of their works, either temporarily or permanently, from their being unable to obtain materials, or in consequence of any accident, or in consequence of strikes or combinations of workmen, or from any cause over which they should not have any control—they shall have power to terminate the agreement, and discharge the infant upon giving him fourteen days' notice, is not void on the face of it so as to prevent it from being enforced against him according to the Act; the question, whether the provision is or is not inequitable as regards the infant, depending upon whether it was at the time of the agreement common to labour contracts, or was in the then condition of trade such as the master was reasonably justified in imposing as protection to himself, and also upon whether the wages were a fair compensation for the services of the infant. LESLIE *v.* FITZPATRICK - - - - 229

INFORMATION, CRIMINAL—Publication of libel in newspaper without knowledge of proprietors - - - - 60
See LIBEL.

INNKEEPER—*Lien on Goods of Guest—General and Particular Lien—Waiver of Lien by Sale of Chattel subject to it.*] The lien of an innkeeper is general, and extends to all goods and chattels belonging to his guest, and therefore a chattel although deposited with the innkeeper and placed by him apart from the personal goods of the guest, may be detained by him on account of money owing to him for the lodging, food, and entertainment of the guest.—The lien of an innkeeper over a chattel belonging to a guest is waived, if in order to reimburse himself he sells it, and this rule holds good even although the retention of the chattel is attended with expense. MULLINER *v.* FLORENCE - - - - C. A. 484

INSURANCE (FIRE)—*Interest of Plaintiff at time of Loss—Vendor in Possession—Intended Demolition of Premises under Compulsory Powers.*] The plaintiff insured his premises in the defendants' office by a policy which provided that their capital should be liable to pay to the assured "any loss or damage by fire to the buildings" not exceeding 1600*l.* The premises were afterwards required by the Metropolitan Board of Works under their compulsory powers, in order that they might be pulled down for the improvement of a street, and the amount of purchase-money payable to the plaintiff was assessed by arbitration, according to the Lands Clauses Act. After the board had accepted the plaintiff's title, but before he had executed a conveyance, the premises were destroyed by fire:—*Held*, that the defendants were liable to pay the plaintiff 1500*l.*, the full value of the buildings at the time of the fire, and not merely the damage done to the buildings considered as old materials, for the dealings between the board and the plaintiff did not affect the defendants' contract. COLLINGRIDGE *v.* ROYAL EXCHANGE ASSURANCE CORPORATION - - - - - 173

INSURANCE, MARINE — *Risk not covered by words of Policy—Deviation.*] A policy of marine insurance stated the risk to be on four pumps "at and from Ardrossan to the *Alexandra* steamer ashore in the neighbourhood of Drogheda, and while there engaged at the wreck and until again returned to Ardrossan by the *Sea Mew* salvage steamer, beginning the risk from the loading on board the said ship $\frac{\text{and}}{\text{or}}$ wreck, including all risk of craft and for boats to and from the vessel and while at the wreck":—*Held*, that the words of the policy did not include the risk whilst the pumps were on board the wreck on a voyage to Belfast, a port of safety. Wingate, Birrell, & Co. *v.* Foster - - - - - - C. A. 582

2. —— *Partial Loss—Cost of Repairs—Allowance of one-third New for Old—Suing and Labouring Clause—Salvage Expenses.*] The defendant insured the plaintiff for 1200*l.* upon a ship valued at 2600*l.*; the policy contained a suing and labouring clause. The ship, encountering rough weather, suffered sea damage, and incurred salvage expenses to the amount of 519*l.* She was repaired, and the result of the repairs, the ship being an old one, was to make her more valuable when repaired than she was at the time of the insurance:—*Held*, affirming the judgment of the Queen's Bench Division, that the cost of repair with a reduction of one-third new for old was the measure of the loss, if the shipowner elected to repair, and consequently that the assured was entitled to recover it up to the amount insured for, even although the amount thus estimated might be more than the amount payable on a total loss with benefit of salvage:—*Held*, also, reversing the judgment of the Queen's Bench Division, that the plaintiff was entitled to recover a proportion of the salvage expenses in addition to the amount for which the policy was underwritten. Lohre *v.* Aitchison - - - - - C. A. 558

3. —— *Unseaworthiness—Loss by Perils of the Sea—Burden of Proof—Presumption—Misdirection.*] In an action on a policy of insurance it was proved at the trial that the vessel put back from inability to proceed eleven days after she started on her voyage: the judge directed the jury that the time which elapsed between setting sail and putting back was sufficiently short to shift the onus of proof from the underwriters, and make it incumbent on the assured to prove that the unseaworthiness arose from causes occurring subsequently to setting sail:—*Held*, affirming the judgment of the Queen's Bench Division, a misdirection.—*Watson* v. *Clark* (1 Dow. 336) commented upon. Pickup *v.* Thames Insurance Company - - - - - C. A. 594

INTERROGATORIES—Wholly disallowed, because partly objectionable—Questions tending to criminate - - - 654
See Practice. 8.

JURISDICTION—Of judge of Court of Arches—Place for hearing cause fixed by archbishop - - - - - 46
See Prohibition. 2.

JUSTICES—Bound to state grounds of refusal of licence - - - - - 374
See Public-house. 1.

JUSTICES—*continued.*
—— Notice to, of appeal - - - - 13
See Sessions. 2.

LANDLORD AND TENANT—New tenancy—How far created by surrender of part of demised premises - - - 495
See Principal and Surety.

LAND TAX—*Hospital chartered before* 1693—*Continuance of exemption of Site after removal of Hospital*—4 *Wm. & M. c.* 1, *s.* 25—38 *Geo.* 3, *c.* 5, *ss.* 25, 29.] By 4 Wm. & M. c. 1, s. 25, the sites of hospitals were rendered exempt from chargeability to land tax. In 38 Geo. 3, c. 5, s. 25 (rendered perpetual by 38 Geo. 3, c. 60, s. 1) this exemption was repeated. By 38 Geo. 3, c. 5, s. 29, all such lands "belonging to any hospital . . . . as were assessed in the fourth year of the reign of King William and Queen Mary" were to be charged with the land-tax; but no other lands "then belonging to any hospital" were to be assessed.—An hospital, erected and chartered before 4 Wm. & M. c. 1, was maintained until 1849, when, pursuant to a decree of the Court of Chancery, the almshouses of which it consisted were taken down and rebuilt upon another spot: the former site of the hospital was then let to the plaintiff:—*Held*, reversing the judgment of the Queen's Bench Division, that the exemption from chargeability for land-tax continued after the site had been let to the plaintiff. Rabbits *v.* Cox [C. A. 307

LANDS CLAUSES ACTS—Arbitration - 446
See Local Board.

LANDS CLAUSES CONSOLIDATION ACT, 1845 (8 *Vict. c.* 18)—*Inquiry as to Compensation—Taxation of Costs by Master under* 32 *&* 33 *Vict. c.* 18, *s.* 1—*Jurisdiction of Court to review Taxation.*] Where costs of an inquiry before arbitrators under the Lands Clauses Consolidation Act, 1845, "are taxed and settled as between the parties by one of the taxing masters of the superior Courts of law" under s. 1 of 32 & 33 Vict. c. 18, the Court has no jurisdiction over the master's taxation on a motion to review.—*Owen* v. *London and North Western Ry. Co.* (Law Rep. 3 Q. B. 54), approved. Sandback Charity Trustees *v.* North Staffordshire Railway Company - - - - - C. A. 1

LEX LOCI—Indorsement in England of bill payable in Spain - - - 514
See Bill of Exchange. 3.

LIBEL—*Criminal Information—Publication by Editor of Newspaper without Knowledge of Proprietors—Lord Campbell's Act* (6 *&* 7 *Vict. c.* 96), *s.* 7.] At the trial of a criminal information against the defendants for a libel published in a newspaper of which they were proprietors, it appeared that each of them managed a different department of the newspaper, but that the duty of editing what was called the literary department was left by them entirely to an editor whom they had appointed named G. The libel in question was inserted in the paper by G. without the express authority, consent, or knowledge of the defendants. The judge having directed a verdict of guilty against the defendants:—*Held*, by Cockburn, C.J., and Lush, J., that there must

LIBEL—*continued.*

be a new trial, for upon the true construction of 6 & 7 Vict. c. 96, s. 7, the libel was published without the defendants' authority, consent, or knowledge, and it was a question for the jury whether the publication arose from any want of due care and caution on their part.—By Mellor, J., dissenting, that the defendants, having for their own benefit employed an editor to manage a particular department of the newspaper, and given him full discretion as to the articles to be inserted in it, must be taken to have consented to the publication of the libel by him; that 6 & 7 Vict. c. 96. s. 7, had no application to the facts proved, and that the case was properly withdrawn from the jury. The Queen *v.* Holbrook 60

2. —— *Privileged Communication—Malice in Fact—Evidence of Express Malice.*] In an action for libel where the occasion is privileged, it is for the plaintiff to establish that the statements complained of were made from an indirect motive, such as anger, or with a knowledge that they were untrue, or without caring whether they were true or false, and not for the reason which would otherwise render them privileged; and if the defendant made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable grounds for his belief. Clark *v.* Molyneux - - - - C. A. 237

LICENCE—To retail beer, wine, and spirits not to be consumed on the premises - 374
See Public-house. 1.

—— To sell exciseable liquors—Term of licence
See Public-house. 2. [407

LICENSED PREMISES—Suffering gaming upon
See Gaming. [454

LIEN—Of innkeeper on goods of guest - 484
See Innkeeper.

LIGHT, prescriptive right to - - 178
See Easement. 1.

LIMITATION—of time for making apportionment under Metropolis Management Act 384
See Metropolis Local Management Act.

LIMITATIONS, STATUTE OF - 7, 340
See Practice. 14.

LOCAL BOARD—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 176, 179, 180—*Land compulsorily taken—Arbitration as to Disputed Compensation, Costs of—Lands Clauses Consolidation Acts*, 1845, 1869.] When land has been taken compulsorily by a local board under the powers of the Lands Clauses Consolidation Acts, incorporated by the Public Health Act, 1875, and an arbitration takes place to determine the amount of compensation to be paid to the owner of the land so taken, the procedure with regard to such arbitration and the right to costs are wholly governed by the provisions of the Lands Clauses Consolidation Acts, and not by those of the Public Health Act, with regard to arbitrations under that Act. Ex parte Rayner - - 446

2. —— *"Street"—Highway, Soil of—Letting Pasturage by the Side of the Road—38 & 39 Vict. c. 55. ss.* 4, 144, 149—*"Vest," Meaning of.*] The

LOCAL BOARD—*continued.*

local board of a district had let the pasturage of the strips of grass which formed the sides of a certain lane within such district, being a highway repairable by the inhabitants at large, to the plaintiff.—The defendant, without any right to do so, turned his cattle on to these strips of land to graze. The plaintiff having brought an action against the defendant for so doing, the latter denied the plaintiff's right to the pasturage:—*Held*, that the lane in question, being by virtue of s. 4 (the interpretation section) of the Public Health Act, 1875, a "street," vested in the local board under the provisions of s. 149; and that the "vesting," intended by that section was not merely of the use and control of the lane so far as might be necessary for highway purposes, but an actual vesting of the property in the lane, and consequently that the lease from the local board entitled the plaintiff to maintain the action. Coverdale *v.* Charlton - - - 376

3. —— *Rescission of Resolution, Bye-law as to —Dismissal of Officer—Quo Warranto Information.*] The Court refused to grant a rule for a quo warranto information applied for by the former occupant of an office, on the ground that his dismissal from office had been illegal, when they were satisfied that if reinstated he might legally and would be dismissed again immediately. —*Semble*, that a resolution of a local board, dismissing an officer, was not a resolution rescinding the resolution by which he was appointed, within the meaning of a bye-law with respect to the rescission of resolutions of the local board.—*Rex* v. *Trustees of Wrexham Turnpike Roads* (5 A. & E. 581) dissented from. Ex parte Richards 368

"LONDON" — District comprised under term "London" - - - - 46
See Prohibition. 2.

LORD CAMPBELL'S ACT—Publication by editor of newspaper without knowledge of proprietors - - - - 60
See Libel. 1.

MALICE—Evidence of express malice - 237
See Libel. 2.

MANDAMUS—*Fellowship—Visitor — Universities Tests Act*, 1871 (34 *Vict. c.* 26)—*Endowment with Religious Test—Hertford College Act*, 1874 (37 & 38 *Vict. c.* 55).] By the Hertford College Act, 1874, Magdalen Hall in the University of Oxford was dissolved, Hertford College created, and the property of Magdalen Hall transferred to Hertford College. An endowment for a lay fellowship restricted to members of certain specified churches was afterwards accepted by Hertford College. T., who was not a member of any of the specified churches, tendered himself for examination as a candidate, and was informed that he might be examined if he desired it, but he must understand that he would not be elected even if he stood at the head of the list. T. did not present himself for examination and M., a duly qualified candidate, was elected after examination to the fellowship. After the election T. applied to the Queen's Bench Division for a mandamus:—*Held*, overruling the decision of the Queen's Bench Division, first, that there was no refusal to

MANDAMUS—*continued.*
examine T.; secondly, assuming that T. was refused examination, the office being full of a candidate properly qualified, a mandamus would not lie commanding the college to examine T. and to proceed to an election: and that T.'s remedy, if any, was by way of appeal to the visitor. —The operation of the Universities Tests Act, 1871 (34 Vict. c. 26) is confined to colleges subsisting before it was passed, and the Act does not prevent the creation in the universities of fresh colleges, the endowments of which are confined to the members of a particular religious community. —The University Tests Act, 1871, is not incorporated with the Hertford College Act. 1874, and s. 13 of the latter Act which provides "that nothing in this Act contained shall be construed to repeal any of the provisions of the Universities Tests Act, 1871," does not render Hertford College a "subsisting college" within the meaning of the former statute. The Queen *v.* Hertford College - - - - C. A. 693

2. —— *Rule for—Impossibility of performing Statutory Duty—Want of Funds.*] The Court will not issue a writ of mandamus against a public body when it is clearly shewn that the performance of the duty sought to be enforced is impossible, by reason of want of funds not involving any default on the part of such body.—An order was issued by the Board of Trade, under the 7th section of the Railway Clauses Act, 1863 (26 & 27 Vict. c. 92), directing a railway company to make a bridge for the purpose of carrying a turnpike road over their line instead of crossing the same on the level.—Previously to the making of this order, the company had exhausted all their powers of raising money in making the line, and, the undertaking proving a failure, they had leased their line in perpetuity to another company, and such lease was confirmed by a special Act of Parliament. The lessees took all the profits of the line, paying a portion of the interest due to the company's debenture stock holders. The company consequently had no funds for the construction of the bridge.—On an application for a mandamus to compel the company to comply with the order of the Board of Trade, the above facts being shewn, the Court discharged the rule for the mandamus. Re Bristol and North Somerset Railway Company - - - - 10

METROPOLIS LOCAL MANAGEMENT ACT (25 & 26 Vict. c. 102), s. 53—*Construction of New Sewer—Limitation of Time for making Apportionment.*] The Metropolis Management Amendment Act (25 & 26 Vict. c. 102), s. 53, enacts that, "where any sewer shall be constructed by any vestry or district board in a street in which previously to such construction there had been no sewer, &c., but where sewers rates had been levied previously to such construction, the expense of constructing such sewer and the works appertaining thereto shall be borne in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively, and the amount to be borne by such owners shall be determined by the vestry or district board in each particular case, and the residue of such expenses shall be defrayed out of the sewers rate" but there is no limitation of the time within which the amount payable by the owners of such land and houses is to be apportioned.—Where therefore a sewer had been constructed within the meaning of the section in 1868, and no apportionment of the amount of the cost of constructing it, to be borne by the owners of the houses in the street, was made until 1876:—*Held*, that the apportionment was valid. Bradley *v.* Greenwich Board of Works - - - - 384

NEGLIGENCE—*Dangerous Instrument in Road—Proximate Cause of Injury—Intervening Act of third Party—Remoteness of Damage.*] The defendant, who was in the occupation of certain premises abutting on a private road consisting of a carriage and footway, which premises he used for the purposes of athletic sports, had erected a barrier across the road to prevent persons driving vehicles up to the fence surrounding his premises and overlooking the sports. In the middle of this barrier was a gap which was usually open for the passage of vehicles, but which, when the sports were going on, was closed by means of a pole let down across it. It was admitted that the defendant had no legal right to erect this barrier. Some person, without the defendant's authority, removed a part of the barrier armed with spikes, commonly called chevaux de frise, from the carriageway where the defendant had placed it, and put it in an upright position across the footpath. The plaintiff, on a dark night, was lawfully passing along the road on his way from one of the houses to which it led. He felt his way through the opening in the middle of the barrier, and getting on to the footpath was proceeding along it when his eye came in contact with one of the spikes of the chevaux de frise and was injured. It was not suggested that the plaintiff was guilty of any negligence contributing to the accident, and the jury found that the use of the chevaux de frise in the road was dangerous to the safety of the persons using it:—*Held*, that the defendant, having unlawfully placed a dangerous instrument in the road, was liable in respect of injuries occasioned by it to the plaintiff, who was lawfully using the road, notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party in removing the dangerous instrument from the carriageway, where the defendant had placed it, to the footpath.—*Mangan* v. *Atterton* (Law Rep. 1 Ex. 239) discussed. Clark *v.* Chambers - - 327

NEWSPAPER—Publication of libel by editor without knowledge of proprietors 60
See Libel. 1.

NOTICE—Of proceedings - - - 183
See Practice. 15.

—— That article sold is mixed - - 449
See Adulteration. 2.

OBSCENE BOOK—*Order for Destruction of*—20 & 21 *Vict. c.* 83, *s.* 1—*Absence of Jurisdiction—Certiorari taken away*—2 & 3 *Vict. c.* 71, *s.* 49—*Metropolitan Police Courts.*] A section in an Act of Parliament taking away the certiorari held not to apply in the case of a total absence of juris-

OBSCENE BOOK—*continued.*
diction.—An order by a magistrate for the destruction of obscene books under 20 & 21 Vict. c. 83, s. 1, is bad if it merely states that the magistrate was satisfied that the books were obscene, but not that he was satisfied that the publication of them would be a misdemeanour, and proper to be prosecuted as such. Ex parte Bradlaugh - - - - - 509

OFFICER—Dismissal of - - - 368
See Local Board. 3.

OFFICIAL REFEREE—Inquiry and report by
See Practice. 11. [295

ORDER AND DISPOSITION—Liquidating debtor allowed to remain in possession of goods
See Bankruptcy. [711

PARTNER—Authority to accept bill of exchange
See Bill of Exchange. 1. [643

PASTURAGE—By side of the road—Property
See Local Board. 2. [376

PENALTY—Imprisonment for non-payment 545
See Public-house. 4.

PERSONATION—Resolution for school board 379
See Elementary Education Acts.

POLL—When duly demanded - - 442
See Company. 1.

POOR LAW—*Divided Parishes Act* (39 & 40 *Vict.* c. 61), *s.* 35—*Abolition of Derivative Settlements—Child under Sixteen—Husband and Wife.*] By 39 & 40 Vict. c. 61, s. 35, no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another . . . . If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have acquired a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born:—*Held*, that the wife of a man who had while under the age of sixteen and before the passing of the Act derived a settlement from his father, took this derivative settlement of her husband, and not his birth settlement; for the settlement which a son while under the age of sixteen derives from his father is excluded from the operation of the section so far as it abolishes derivative settlements. Great Yarmouth *v.* City of London - - 232

2. —— *Divided Parishes Act* (39 & 40 *Vict.* c. 61), *s.* 35—*Child under Sixteen—Mother Marrying again.*] Under the Divided Parishes Act (39 & 40 Vict. c. 61), s. 35, which enacts that—no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take

POOR LAW—*continued.*
the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another—children under the age of sixteen gain no settlement by a second marriage of their widowed mother. Keynsham Union *v.* Bedminster Union - - - - 344

3. —— *Settlement—Order of Removal, how far conclusive—Change of Law pending Order of Removal*—39 & 40 *Vict.* c. 61, *ss.* 35, 36.] An order for the removal of a pauper to the place of his birth settlement confirmed by sessions subject to a case, was quashed on the ground that the facts shewed a settlement which the pauper derived from his grandfather. Between the order at sessions and the decision upon the case, the Act 39 & 40 Vict. c. 61, abolishing a derivative settlement, such as that above-mentioned, became law, and a fresh order for the removal of the pauper to the place of his birth settlement was made:—*Held*, that such order must be quashed, for the quashing of the first order was a conclusive adjudication of the settlement of the pauper, inasmuch as the facts upon which it proceeded were unaltered, and its validity could not be affected by a subsequent change in the law, and further, because it must be taken to be an order "pending" at the date of the Act, and therefore under s. 36 excluded from its operation. Barton Regis Union *v.* Overseers of Liverpool - 295

4. —— *Settlement by Residence—Removal*—39 & 40 *Vict.* c. 61, *s.* 34.] Under 39 & 40 Vict. c. 61, s. 34, which enacts that "where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise":—*Held*, that a person who had resided in a parish for a term of three years, and who continued to reside there until the passing of the Act, but who, during the period subsequent to the three years, was in receipt of relief from the parish, acquired a settlement therein under the section. The Queen *v.* Brampton Union 479

POOR RATE—*Canal—"Lands of a like quality"—Mode of Assessment.*] By a canal company's special Act, it was provided that the lands of the company, whether covered with water or not, and also all dwelling-houses, wharves, warehouses, lockhouses, and other houses of the company, should be rateable; the lands according to their quantity and quality, and the dwelling-houses, &c., according to the nature and respective uses, dimensions, and descriptions thereof; and should be charged and assessed in like manner as lands of a like quality and dwelling-houses, &c., of a like and similar size, nature, dimension, or description in the respective parishes where the same should be situate, were, or should be assessed or charged. The lands adjoining the canal were all built upon, and the assessment committee sought to assess the canal and towing-path on the following principle. They assumed the area

POOR RATE—*continued.*

occupied thereby to be covered by buildings similar in rateable value to the buildings adjoining the canal, allowing for necessary roads, access, &c., and then took a proportionate part of such rateable value as representing the rateable value of the lands so covered as distinguished from the buildings:—*Held*, that, the canal ought to be rated in like manner as land of the like quality in the parish uncovered with buildings, the value of which might be increased from time to time by circumstances, and that the mode of assessment proposed by the assessment committee was therefore incorrect. Regent's Canal Co. *v.* St. Pancras - - - - - 73

2. —— *Rating of Shipbuilding Premises—Machinery capable of being removed without Injury—6 & 7 Wm. 4, c. 96, s. 1.*] In assessing shipbuilding premises to the poor-rate, the value of machinery attached to the premises is to be taken into consideration in ascertaining their rateable value where such machinery, though some of it may be capable of being removed without injury to itself or the freehold, is essentially necessary to the shipbuilding business to which the premises are devoted, and intended to remain permanently attached to them so long as they are applied to their present purpose. Laing *v.* Bishopwearmouth - - - - - - 299

PRACTICE—*Dismissal of Action for want of prosecution—Order XXIX., Rule 1—Extension of Time for delivery of Statement of Claim.*] An order was made under Order XXIX., Rule 1, dismissing an action for want of prosecution, unless a statement of claim should be delivered within a week. The week having expired, and no statement of claim having been delivered:—*Held*, that the action was at an end, and there was no jurisdiction to make an order subsequently extending the time for delivery of the statement of claim. Whistler *v.* Hancock - - 83

2. —— *Award, Time for setting aside—9 & 10 Wm. 3, c. 15, s. 2—Judicature Act*, 1873 (36 & 37 *Vict. c. 66), s. 26.*] By 9 & 10 Wm. 3, s. 2, an application to set aside an award must be made before the last day of the term after the arbitration.—By 36 & 37 Vict. c. 66, s. 26, "terms" are abolished, but they may continue to be referred to in all cases in which they were used as a measure for determining the time within which an act is required to be done.—An award was made on the 28th of March, 1877. An application to set it aside, under 9 & 10 Wm. 3, c. 15, s. 2, was made in the Easter sittings on a day after the 8th of May. Easter Term in 1877, under the former procedure, would have begun on the 15th of April and ended on the 8th of May:—*Held*, affirming the judgment of the Queen's Bench Division, that the application ought to have been made on a day before the 8th of May, for "terms" still exist as a measure for determining the time within which an award should be set aside under 9 & 10 Wm. 3, c. 15, s. 2. College of Christ, Brecknock *v.* Martin - - - C. A. 16

3. —— *Remitting Case to County Court—30 & 31 Vict. c. 142, s. 10—Security for Costs, Extension of Time for giving.*] An order was made under 30 & 31 Vict. c. 142, s. 10, remitting an

PRACTICE—*continued.*

action to the county court unless security was given for costs within a week. The plaintiff did not give security within the time limited, but after that time applied for and obtained an order extending the time for giving security:—*Held*, that until the plaintiff had lodged the writ and order remitting the action with the registrar of the county court in accordance with the 10th section of 30 & 31 Vict. c. 142, s. 10, the action remained in the superior Court, and consequently there was jurisdiction to make the order extending the time for giving security. Welply *v.* Buhl [80; C. A. 253

4. —— *Costs—County Courts Act*, 1867 (30 & 31 *Vict. c. 142), s. 5—"Action founded on Contract or on Tort."*] The statement of claim alleged that the plaintiff, as vendor of goods, delivered them to the defendants, a railway company, as carriers for reward, the goods being consigned to the intending purchasers: that afterwards, and before the goods had been delivered to the consignees or claimed by them from the defendants, the plaintiff discovered that the consignees were insolvent, and, as unpaid vendor, gave notice to the defendants not to deliver the goods to the consignees, but to hold them to the plaintiff's order, and before the goods were delivered to the consignees the plaintiff required the defendants to re-deliver them to him: that the defendants refused to do so, and delivered them to the consignees, who absconded without paying for the goods. The plaintiff claimed their value, viz., 12*l.* 16*s.* 6*d.* as damages. The defendants paid that sum into court, and the plaintiff took it out in satisfaction:—*Held*, that the action was "founded on tort," and not "on contract" within s. 5 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), and that the plaintiff having recovered a sum exceeding 10*l.* was not deprived of costs by that section. Pontifex *v.* Midland Railway Company - - - - 23

5. —— *Security for Costs—Foreigner residing without the Jurisdiction — Counter-claim.*] A defendant who admits the cause of action sued upon and sets up a counter-claim founded upon a distinct claim, is not entitled to security for costs from the plaintiff, a foreigner residing without the jurisdiction. Winterfeld *v.* Bradnum C. A. 324

6. —— *Discovery—Correspondence in Suit between Plaintiff and Third Party—Order XXXI., Rules 11, 12, 13, 18.*] In an action by the plaintiffs against the defendants for not unloading at the port of discharge a cargo of rice purchased by the defendants from the plaintiffs, whereby the plaintiffs, who had entered into a charterparty upon terms as to the discharge of the ship similar to those contained in the contract of sale, were sued by and had to pay damages to the shipowner:—*Held*, that the defendants were not entitled to inspection of the papers in the plaintiffs' possession relating to the action brought against them by the shipowner, including correspondence between them and their solicitor, and between their solicitor and other persons; for such papers would have been privileged from discovery in the former action, and the fact that such action had terminated did not deprive them of their privilege. Bullock *v.* Corry - - - - - 356

PRACTICE—*continued.*

7. —— *Discovery and Inspection of Documents—Communication from Agent of Party—Instructions to Solicitor and Materials for such Instructions—Privilege.*] Documents prepared in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged if prepared with a bonâ fide intention of being laid before him for the purpose of taking his advice; and an inspection of such documents cannot be enforced. Southwark and Vauxhall Water Company *v.* Quick - - - - - - C. A. 315

8. —— *Striking out Interrogatories—Party—Witness—Questions to Credit—Answers tending to Criminate—Order XXXI., Rule* 5.] A party who applies to strike out interrogatories must, unless they are altogether an abuse of the practice of the Court, specify those to which he objects.—Questions which go merely to the credit of the witness, and might be put in cross-examination, cannot be put as interrogatories to a party, and are as such irrelevant.—Where the answer to an interrogatory might tend to criminate the person interrogated, he may refuse to answer, but the interrogatory is not therefore objectionable. Allhusen *v.* Labouchere - - - - - C. A. 654

9. —— *Setting aside Judgment by Default—Delay—Action against Married Woman—Separate Estate without Power of Anticipation.*] Where no irreparable wrong will be done to a plaintiff who has obtained judgment by default, lapse of time is not a bar to an application to set it aside.—A married woman, having a separate estate without power of anticipation, is not liable to be sued personally in respect of a debt contracted during her coverture; and in order that a creditor may obtain payment out of her personal estate, he must join as defendants her husband and the trustees of her settlement. Atwood *v.* Chichester [C. A. 722

10. —— *Application for New Trial—Action commenced in Chancery Division—Divisional Court—Rules of Court, Order XXXVI., Rule* 29*a* (*Dec.* 1876) — *Order XXXIX., Rule* 1 (*Dec.* 1876)—*Order by Chancery Judge directing trial in Middlesex.*] Where an action attached to the Chancery Division has been tried by a jury before a judge of one of the Common Law Divisions, application for a new trial must be made to a Divisional Court. —Where an action attached to the Chancery Division is to be tried by a jury, and, no place of trial being named in the statement of claim, the action is set down to be tried in the county of Middlesex, no special order of the judge of the Chancery Division, stating the reason why it should be so tried, is necessary. Hunt *v.* City of London Real Property Company - - C. A. 19

11. —— *New Trial — Action remitted to County Court—Time within which motion must be made—Judicature Act, Order XXXIX. Rules* 1 *and* 1*a.*] Rules 1 and 1a of Order XXXIX. do not apply to motions for new trials in actions remitted to the county court for trial under 19 & 20 Vict. c. 104, s. 20. Consequently a motion for a new trial in such an action must be made within the time limited by the old practice. London *v.* Roffey - - - - - - 6

PRACTICE—*continued.*

12. —— *Reference under Judicature Act*, 1873, *s.* 56, 57—*Offici al Referee—Reference for Report—Reference for Trial.*] The Court or a judge has no power under ss. 56, 57 to order an action to be referred to an official referee, for s. 56 only allows any question arising in a cause to be referred for inquiry and report, and the report may or may not be adopted by the Court; and s. 57 only allows any question or issue of fact, or any question of account, to be tried before an official referee if the parties consent in any cause, and if they do not consent, in any cause requiring a prolonged examination of documents or accounts, or any scientific or local investigation. An official referee has no power to order judgment to be entered on any question referred to him under ss. 56, 57 of the Judicature Act, 1873. Pontifex *v.* Severn - - - - C. A. 295

13. —— *Special Indorsement on Writ—Order III., Rule* 6—*Order XIV., Rule* 1.] The writ of summons in an action was indorsed as follows: "The plaintiffs' claim is 399*l.* 9*s.* 7*d.*, the defendant's share or contribution to the payment of certain bills of exchange and promissory notes on which he and the plaintiffs were jointly liable, and which bills and notes have been taken up by the plaintiffs":—*Held*, that this indorsement did not constitute a good "special indorsement" under Order III., Rule 6, and therefore the judgment which had been signed under Order XIV., Rule 1, must be set aside. Walker *v.* Hicks 8

14. —— *Renewal of Writ—Extension of Time—Statute of Limitations.*] The Court has no power under Order LVII., Rule 6, to extend the time for renewing a writ of summons where the claim would, in the absence of such renewal, be barred by the Statute of Limitations. Doyle *v.* Kaufman - - - 7; C. A. 340

15. —— *Substituted Service — Order IX., Rule* 2—*Absence of Notice of Proceedings—Setting aside Judgment—Discretion.*] The plaintiff, being unable to serve one of the defendants with the writ, obtained an order for substituted service against him under Order IX., Rule 2, and the action proceeded to judgment against all the defendants. The defendant against whom the order for substitated service had been made applied to be let in to defend, on the ground that he had a defence on the merits, and that he had never had any notice of the action while pending:—*Held*, that as an order for substituted service had been properly made and service effected under it, the judgment was regular, and that the defendant could not, ex debito justitiæ, claim to be let in to defend the action; but that the Court, in the exercise of its discretion, could allow him to do so if it were shewn that he had no knowledge of the proceedings and had a defence on the merits; and that, as the giving leave was discretionary, the Court could impose terms. Watt *v.* Barnett [183; C.A. 363

PREFERENCE — Undue preference by railway company - - - - - 134
See Railway Company. 3.

PRESCRIPTION—Presumption of right to support from adjoining soil - - - 85
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PRINCIPAL AND AGENT—Corrupt payment to agent - - - - - **549**
See CONTRACT.

PRINCIPAL AND SURETY—*Discharge of Surety by Alteration of the Guaranteed Contract—Materiality of Alteration in Contract between Principals—Landlord and Tenant—Surrender of part of Demised Premises—Notice to quit.*] The plaintiff having agreed to let to G. B., as yearly tenant, a farm, including certain hill pastures and a flock of 700 sheep, the defendant gave the plaintiff a bond to secure the re-delivery to him at the end of the tenancy of the flock in good order and condition. In November the plaintiff gave G. B. a notice to quit, which was ineffectual to determine the tenancy at the expiration of the then current year. G. B. objected to the insufficiency of the notice, and on the 8th of April entered into an agreement with the plaintiff that G. B. should surrender a field to the plaintiff, that G. B.'s rent should be reduced 10*l.*, and the notice to quit should be considered as withdrawn. G. B. then continued tenant of the farm less the field at the reduced rent. In October, 1876, the plaintiff gave G. B. notice to quit on the 10th of April, 1877. On giving up the farm it was ascertained that the flock was reduced in number and deteriorated in quality and value, and the plaintiff sued the defendant on his bond:—*Held*, by Brett, Cotton, and Thesiger, L.JJ., that neither the giving of the notice to quit and its withdrawal, nor the surrender of the field and the reduction of the rent, created a new tenancy.—*Tayleur* v. *Wilden* (Law Rep. 3 Ex. 303) distinguished.—*Held*, also, by Cotton and Thesiger, L.JJ., Brett, L.J. dissenting, that the contract of the surety was that the flock should be delivered up in good condition together with the farm as originally demised to the tenant; that the surety ought to have been asked to decide whether he would assent to the variation in the terms of the letting, and not having been asked to assent he was discharged from liability.—At the trial the judge left it to the jury to say whether the new agreement with the tenant had made any substantial or material difference in the relation between the parties, as regarded the tenant's capacity to fulfil the condition of the bond:—*Held*, by Cotton and Thesiger, L.JJ., Brett, L.J., dissenting, that the question was one which ought not to have been submitted to a jury; that the surety was the sole judge whether it was reasonable that he should remain liable notwithstanding the new agreement. HOLME *v.* BRUNSKILL - - - - - - **C. A. 495**

PROHIBITION—*Court of Arches—Monition to abstain in future from illegal Practices—Suspension of Incumbent for Contumacy—Power to deal with subsequent Offence on Motion.*] A clerk in orders who has been in a criminal suit admonished by the Court of Arches to abstain from illegal practices in the services of the church, cannot for disobedience to the monition be summarily condemned to suspension, and a prohibition will be granted to restrain the execution of any such sentence.—*Hebbert* v. *Purchas* (Law Rep. 4 P. C. 301) dissented from.—A suit having been instituted against the incumbent of a parish under 3 & 4 Vict. c. 86, charging that he had been

PROHIBITION—*continued.*

guilty of illegal practices in the services of the church the Court of Arches by a decree having the force of a definitive sentence pronounced the defendant guilty of practices which were offences against the laws ecclesiastical, pronounced sentence upon him of suspension ab officio for six weeks, and admonished him to abstain in future from the practices thereby condemned. The monition was duly served upon the defendant, and application having been subsequently made to the Court, alleging that he had been guilty of disobedience to the monition, the Court declared that he had disobeyed the monition, and further admonished him to abstain from the practices in question. A second monition was accordingly issued, and a further application having been made on affidavits shewing continued disobedience, and asking that the monitions might be enforced in such manner as to the Court should seem meet, the Court, the defendant failing to appear, decreed that he had disobeyed the monitions; declared him to have been guilty of contumacy, and sentenced him to be suspended ab officio et beneficio for the term of three years:—*Held* (by Cockburn, C.J., and Mellor, J., Lush, J., dissenting), that both the monitions were beyond the jurisdiction of the Court of Arches and that a prohibition must be granted, for a monition in a criminal suit could not be appended to a definitive sentence awarding a specific punishment so as to warrant any further proceedings, on a repetition of the offence, as for contumacy, and even if a monition could be so pronounced, disobedience to it could not be punished by suspension but only by imprisonment as provided by 53 Geo. 3, c. 127, s. 1.—By Lush, J., dissenting, that the prohibition ought not to be granted, for the monitions were neither expressly nor impliedly prohibited by the Act 3 & 4 Vict. c. 86, and the question whether they were in accordance with the established practice of the Court of Arches was one which did not affect the jurisdiction of that Court, and could not be considered upon an application for a prohibition. MARTIN *v.* MACKONOCHIE - **730**

2. —— *Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85), *ss.* 7, 8, 9—*Requirement as to Place of Hearing Cause, how far Directory.*] The Public Worship Act, 1874 (37 & 38 Vict. c. 85), s. 7, makes provision for the appointment of a judge of the Provincial Courts of Canterbury and York. By s. 8 a representation under certain circumstances may be made to the bishop of illegal acts or omissions in the performance of the church services, by any incumbent within his diocese; and by s. 9 if the bishop is of opinion that proceedings should be taken on the representation, he shall, if the parties are unwilling to submit to his directions without appeal, transmit the representation to the archbishop of the province, and the archbishop "shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London, or Westminster."—A representation under the above Act was forwarded to the Bishop of Rochester charging that T., the incumbent of a parish within the diocese, had been guilty of illegal practices in the conduct of divine service. The bishop transmitted the

PROHIBITION—*continued.*

representation to the Archbishop of Canterbury, and the archbishop thereupon by instrument of requisition required the judge to hear and determine the matter of the representation "at any place in London or Westminster, or within the diocese of Rochester, as you may deem fit." Notice was given to T. that the case would be heard in Lambeth Palace, which, although within the province of Canterbury, is neither in London, Westminster, nor the diocese of Rochester.—In July, 1876, the case was heard at Lambeth Palace in his absence, and he was adjudged to have been guilty of illegal practices, and a monition was made for him to abstain from them. On his non-compliance with the monition, he was pronounced guilty of contempt and imprisoned. From first to last he took no notice of the proceedings, and in no way acquiesced in them:—*Held*, that the whole proceeding was void, and a prohibition must be granted, for the word "London" in the requisition could only be construed in its strict sense as the city proper of London, and the judge had no power, under the Act or otherwise, to sit in any place beyond the limits fixed by the archbishop. Hudson *v.* Tooth - - 46

PROXIES—Holder of, not entitled to demand poll - - - - - 442
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PROXIMATE—cause of injury - - 327
See Negligence.

PUBLIC-HOUSE—*Licensing Acts* (32 & 33 *Vict. c.* 27), *s.* 8; (35 & 36 *Vict. c.* 94), *s.* 69—*Licences to retail Beer, Wine, and Spirits not to be consumed on the Premises—Justices bound to state Ground of refusal—Mandamus to hear and determine.*] By the provisions of the statutes relating to licensing, certain licences for the sale of intoxicating drinks not to be consumed on the premises are not to be refused, except on one or more of four grounds specified. Justices on refusing to grant such a licence did not state any ground for such refusal. They were not, however, asked to state their ground for such refusal; and on an application for a mandamus against them to hear and determine the application for the licence, the chairman of the justices made an affidavit that they had in fact acted on one of the grounds on which they were empowered to refuse the licence:—*Held*, on the authority of *Reg.* v. *Sykes* (1 Q. B. D. 52), that the justices were bound to state their grounds at the time of refusing the application, and the mandamus therefore went. Ex parte Smith 374

2. —— *Licence to sell Excisable Liquors—Licensed Person giving up possession of Premises during the continuance of the Licence—New Tenant—Application to Special Sessions*—9 *Geo.* 4, *c.* 61, *ss.* 4, 13, 14.] The power of granting a licence at special sessions under 9 Geo. 4, c. 61, s. 14, to a new tenant, where a person duly licensed under that Act gives up possession of the house during the continuance of his licence, extends only to the period for which the former tenant's licence would have lasted.—F., duly licensed under 9 Geo. 4, c. 61, on the 3rd of August, 1877, gave up possession of the licensed premises, and B. became tenant. The licence expired on the 10th of October following. At the general annual

PUBLIC-HOUSE—*continued.*

licensing meeting, held on the 28th of August, 1877, B. applied for a transfer of the licence to him, but the justices refused the application on the ground of his previous misconduct. On the 28th of September, B. gave up his tenancy, was succeeded by G., who on the 29th of November also gave up the tenancy, and was succeeded by T. After giving the proper notices, T. applied at a special sessions, under s. 14 of 9 Geo. 4, c. 61, for a licence in respect of the premises. The justices declined to entertain the application, on the ground that they had no jurisdiction:—*Held*, that, inasmuch as the application was made after the expiration of the period for which the previous licence remained in force, the decision of the justices was right.—*Semble* (per Cockburn, C.J., and Manisty, J.), that the power to grant a licence under s. 14 is not confined to the case of the tenant immediately succeeding the outgoing holder of the licence. Ex parte Todd - 407

3. —— *Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 3, 51—*Pecuniary Penalty—Alternative Penalty of Imprisonment—Imprisonment in Default of Payment—Order for Distress, condition of Jurisdiction under* 35 & 36 *Vict. c.* 94, *s.* 51, *sub-s.* 2.] The justices cannot order imprisonment in default of payment of a penalty under 35 & 36 Vict. c. 94, s. 51, sub-s. 2, unless there has first been an order for a distress. There is no jurisdiction to order imprisonment under that sub-section in the first instance without a distress warrant, when it appears that the defendant has no goods whereon to levy.—Per Cockburn, C.J. The 2nd sub-section of the 51st section of 35 & 36 Vict. c. 94 applies to cases where a pecuniary penalty only is attached by the Act to an offence, not to cases where a period of imprisonment other than that given by the 51st section is given as an alternative punishment. Re Brown - 543
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See Sessions. 2.

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RAILWAY COMPANY—*Bye-law, Validity of—Travelling in Carriage with Ticket of Inferior Class*—8 *Vict. c.* 20, *s.* 103.] By 8 Vict. c. 20 s. 103: "If any person, having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare . . . and with intent to avoid payment thereof, he shall for every such offence forfeit 40*s.*" By s. 108 "The company, subject to this and the special Act may make regulations for regulating the travelling upon or using and working the railway." By s. 109: "For better enforcing the allowance of all and any of such regulations, it shall be lawful for the company subject, &c., to make bye-laws . . . . provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act." By a bye-law made under the above Act "any person travelling without the special permission of some duly authorized servant to the company, or by a train of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding

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40*s.*, and shall in addition be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally started, unless he shews that he had no intention to defraud."—The appellant was convicted in a penalty of 10*s.* under this bye-law for travelling in a first-class carriage with only a second-class ticket; but it was found as a fact that he had no intention to defraud the company:—*Held*, that the conviction must be quashed, for without deciding whether the bye-law did or did not make proof of the absence of fraudulent intention, an exemption from the penalty as well as the extra fare, it was, if it made the fraudulent intention immaterial in the case of the penalty, repugnant to 8 Vict. c. 20, s. 103, and ultrà vires the company. BENTHAM *v.* HOYLE **289**

2. —— *Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 7—*Special Conditions—Wilful Misconduct—Alternative Rates.*] The plaintiff, under a contract in writing signed by his agent, delivered to the defendants certain cheeses to be carried from L. to S. at "owner's risk." As the plaintiff knew, the defendants had two rates of carriage; a higher rate, when they took the ordinary liability of carriers, and a lower, when they were relieved of all liability, except that arising from the wilful misconduct of their servants. In using the words "owner's risk" the plaintiff intended that the cheeses should be carried at the lower rate, and subject to the conditions restricting the defendants' liability. The defendants' servants packed the cheeses in such a manner that during their transit upon the defendants' railway they were damaged, but the defendants' servants did not know that damage would result from the mode in which the cheeses were packed:—*Held*, that, as the defendants carried at alternative rates, the condition excepting them from liability when carrying at the lower rate was just and reasonable; and that the injury to the cheeses had not arisen from the wilful misconduct of their servants. LEWIS *v.* GREAT WESTERN RAILWAY COMPANY **C. A. 195**

3. —— *Superfluous Lands—Lands taken under Powers of Special Act—Lands acquired for extraordinary Purposes—Lands not in actual use at expiration of period limited for disposing of Superfluous Land, but subsequently becoming useful for Purposes of Undertaking—Mines and Minerals expressly conveyed to Railway Company, ownership of, where Surface afterwards becomes Superfluous Land—Inclosure—Grass and Herbage arising upon Soil of Road running between Allotments—41 Geo.* 3, *c.* 109, *s.* 11—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 12, 13, 127—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 45.] Where a railway company are authorized by their special Act (with which the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, are incorporated) to acquire lands compulsorily and also for extraordinary purposes, land delineated in the parliamentary plans, and described in the books of reference, and purchased by the company pursuant to agreement, no notice to treat having been given, must be deemed to have been acquired under the "provisions" of

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the special Act, and the Lands Clauses Consolidation Act, 1845, within the meaning of s. 127 of the latter Act; and although for some years after the purchase no works are constructed upon the land, yet if at a subsequent time it becomes useful for the purposes of the railway, it cannot be deemed to have been purchased for extraordinary purposes.—Where lands have been taken by a railway company under the provisions of their special Act, and retained by them, with the bonâ fide intention of using them for the purposes of the railway, and at the expiration of the period for the sale of superfluous lands, though they are not in actual use, there is a reasonable prospect of their being ultimately required and used for the purposes of the railway, such lands are not superfluous within the Lands Clauses Consolidation Act, 1845, s. 127.—By Bramwell and Brett, L.JJ.:—Where lands which a railway company are authorized by their special Act to take, have been conveyed to them, together with an express grant of the mines and minerals thereunder, although the surface may afterwards become superfluous by virtue of the Lands Clauses Consolidation Act, 1845, s. 127, yet the mines and minerals do not vest in the adjoining owners.—By Bramwell and Brett, L.JJ.:—Where commonable lands have been inclosed under an award made pursuant to a local statute, passed subsequently to 41 Geo. 3, c. 109, and by the award the soil of the roads running between the allotments remains vested in the lord of the manor, if the land upon one side of a road becomes superfluous within the Lands Clauses Consolidation Act, 1845, s. 127, it will vest in the lord of the manor, for the right to the grass and herbage arising upon the road, under 41 Geo. 3, c. 109, s. 11, is insufficient to render the proprietor of the close upon the other side of the road an adjoining owner.—*Semble*, by Bramwell, L.J., where the natural drainage of land belonging to a railway company and demised by them for agricultural purposes, flows into a reservoir used by them for the supply of water to their engines, the land is not superfluous within the Lands Clauses Consolidation Act, 1845, s. 127. HOOPER *v.* BOURNE **[C. A. 258**

4. —— *Undue Preference—Gratuitous Carting—Loading and Unloading Customer's Goods in order to prevent Traffic from passing over other Railway—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 3, 90—*Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2.] The plaintiff was a brewer carrying on business at B., where the defendants, a railway company, and the M. Company, another railway company, had stations. Three firms of brewers also carried on business at B., and their premises respectively were connected with the M. Railway. The plaintiff's were not connected with either the M. Railway or the defendants' railway. In order to prevent the traffic of the three firms from passing wholly over the M. Railway and to divert some portion of it to their own line, the defendants agreed to cart goods gratuitously between their station at B. and the premises of the three firms respectively, and they also allowed certain deductions from the rates charged to the three firms for

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the carriage of their goods, the effect of which was that their goods were loaded and unloaded by the defendants gratuitously. The defendants did not cart gratuitously for the plaintiff between his premises and their station, and they did not allow to him deductions similar to those allowed to the three firms. After carting the goods for the three firms gratuitously and allowing them the deductions before-mentioned, the defendants derived a profit from the traffic, and they had not any intention to prejudice the plaintiff:—*Held*, affirming the judgment of the Queen's Bench Division, that the gratuitous carting, loading and unloading of the goods for the three firms was an inequality in favour of them and an undue preference granted to them by the defendants, and was in contravention of 8 & 9 Vict. c. 20, s. 90, and 17 & 18 Vict. c. 31, s. 2, and that the plaintiff was entitled to maintain an action to recover the amounts paid by him to the defendants, which represented the cost of carting his goods between his premises and their station at B., and of loading and unloading the same. Evershed *v.* London and North-Western Railway Company [C. A. 134

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SALE OF GOODS—*False Representation—Contagious Disease, Animals affected with—Sale in Market—Implied Representation that Animals not suffering from Disease—Conditions of Sale—Contagious Diseases (Animals) Act*, 1869 (32 & 33 *Vict. c.* 70), *s.* 57—*Vendor and Purchaser.*] The defendant sent for sale to a public market pigs which he knew to be infected with a contagious disease; they were exposed for sale subject to a condition that no warranty would be given and no compensation would be made in respect of any fault. No verbal representation was made by or on behalf of the defendant as to the condition of the pigs. The plaintiff having bought the pigs, put them with other pigs, which became infected; some of the pigs bought from the defendant and also some of those with which they were put died of the contagious disease. The plaintiff having sued to recover damages for the loss which he had sustained:—*Held*, reversing the judgment of the Queen's Bench Division, that, although the defendant might have been guilty of an offence against the Contagious Diseases (Animals) Act, 1869, he was not liable to the plaintiff, for that his conduct in exposing the pigs for sale in the market did not amount to a representation that they were free from disease. Ward *v.* Hobbs [C. A. 150

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SESSIONS—*Court of Appeal—Jurisdiction—Case stated by Quarter Sessions—Certiorari—"Judgment or Order"—"Appeal"—Supreme Court of Judicature Act*, 1873, *ss.* 19, 45.] The Court of Appeal has no jurisdiction to entertain an appeal from a decision of the Queen's Bench Division upon a rule for quashing an order of Quarter Sessions as to the validity of a rate. (By Cockburn, C.J., and Brett, L.J.; Bramwell and Cotton, L.JJ., dissenting.)—[Reversed on appeal to House of Lords, November, 1878.] The Queen *v.* Overseers of Walsall - - C. A. 457

2. —— *Notice of Appeal—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 52—"*Court of Summary Jurisdiction*"—*Service on Clerk to Justices insufficient.*] A notice of appeal against a conviction under s. 12 of the Licensing Act, 1872, by two of the justices of the Cinque Ports, was addressed generally to the justices of the Liberties of the Cinque Ports, without naming any particular justices, and was served upon the clerk to the justices out of court:—*Held*, that such notice, and the service thereof, were insufficient, as not being in compliance with the 52nd section of the Licensing Act, which requires notice of appeal to be given to the "court of summary jurisdiction." Ex parte Curtis - - - - 13

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SHIP AND SHIPPING—*Certificate of Master, Suspension of—Stranding of Ship—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 242, 432—*Merchant Shipping Act* (39 & 40 *Vict. c.* 80), *ss.* 29, 32—*Jurisdiction of Wreck Commissioner.*] The Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), does not extend the jurisdiction to suspend or cancel the certificate of the master to cases not within the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 242, 432. There is, therefore, no power to suspend the master's certificate where a ship has merely been stranded without material damage to the ship or loss of life. Ex parte Story - - - - - - 166

2. —— *Charterparty, Construction of—Despatch Money for Time saved in loading and discharging Cargo.*] A charterparty contained the following clause:—"Demurrage, if any, at the rate of 20*s.* per hour, except in case of any hands striking work, frosts or floods, revolution or wars, which may hinder the loading or discharge of the vessel. Despatch money 10*s.* per hour on any time saved in loading or for discharging." Four days were saved in loading and five days in discharging cargo, making together nine days, which if calculated at twenty-four hours a day would make 216 hours, or at twelve hours a day 108 hours:—*Held*, by Baggallay, Bramwell, and Brett, L.JJ., reversing the judgment of the Queen's Bench Division, that "despatch money" was payable under the charterparty at the rate of 10*s.* per hour per day of twenty-four hours. Laing *v.* Hollway [C. A. 437

3. —— *Charterparty—Bill of Lading—Demurrage—Liability to Shipowner of Consignee prevented from discharging his Goods by the Delay of other Consignees.*] A charterparty entered into betweed the plaintiffs, and B. & Co. for the conveyance of grain from C. to L., stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at 35*l.* a day. The vessel having been loaded, one of the bills of lading was indorsed to the defendants. The defendants' grain was stowed at the bottom of the main hold, and that of the other shippers on the top of it. The bill of lading, indorsed to the defendants, contained the words "paying freight for the same goods and all other conditions as per charterparty." Owing to the consignees, whose grain was placed on the top of the defendants', having failed to take away their goods within the lay days, the defendants were unable to obtain delivery of their grain, and three days' demurrage

SHIP AND SHIPPING—*continued.*

was incurred:—*Held*, affirming the judgment of Lush, J., that the defendants were liable for the demurrage, although they were prevented from getting their goods by the delay of other consignees. Porteus *v.* Watney **227; C. A. 534**

4. —— *Demurrage—Bill of Lading—Charterparty—Consignee prevented from clearing Ship by the Default of other Consignees.*] A cargo of wheat was shipped on board the plaintiff's ship under eight bills of lading which contained the following clause:—Three working days to discharge the whole cargo or 30*l.* sterling per day demurrage." The defendants, the indorsees of one of the bills of lading, were prevented from completely unloading their portion of the cargo within the lay days, because it lay at the bottom of the hold under the portions of cargo belonging to the other consignees, and such other portions of the cargo were not unloaded in time to enable the defendants to clear the ship of their portion within the lay days. The master was ready and willing to discharge the defendants' portion of the cargo as soon as it could be reached, and the defendants to receive the same, and the discharge of it in due time was only prevented by the before-mentioned circumstances:—*Held*, that under the above-mentioned stipulation of the bill of lading the consignee, as between himself and the shipowner, undertook to bear the risk of being prevented from discharging his portion of cargo from the ship within the lay days by the default of his fellow consignees, and the defendants were therefore liable for demurrage. Straker *v.* Kidd **223**

5. —— *General Average—Special Charges—Remuneration to Shipowner for Services in transhipping and identifying Cargo, and arranging with Consignees for sale of part unidentified—Commission on Disbursements.*] A ship during her voyage from India to London was stranded on the coast of France. The shipowner despatched his manager and other persons to take part in the necessary salvage operations, and the whole of the cargo was saved, transhipped, and brought forward to London and the freight earned. Part of the cargo which could not be identified was sold by the shipowner by arrangement with the consignees through a broker, who received his brokerage. The shipowner incurred considerable trouble in chartering ships to carry on the cargo from France to London, and in sending out lighters and necessary appliances to France, and in the identification of the cargo, preparing for the sale, answering the inquiries of and arranging with the consignees. In the average statement a remuneration to the shipowner for "arranging for salvage operations, receiving cargo, meeting and arranging with consignees, and receiving and paying proceeds, and generally conducting the business," was charged partly to general average, and partly as particular average on the several interests rateably, the average stater thinking that the amount was a reasonable remuneration to the shipowner for his services and for commission on the sale of unidentified cargo, and on disbursements:—*Held*, that under the circumstances the amount was improperly charged and could not be recovered, there being no contract on the part of the owners of the cargo to remunerate the ship-

SHIP AND SHIPPING—*continued.*
owner for his services, a great part of which had been rendered with the object of earning his freight. Schuster *v.* Fletcher - - 418

SOLICITOR AND CLIENT—*Costs—Taxation after Payment—Defendant agreeing to pay Plaintiff's Solicitor fixed sum for Costs—Special Circumstances*—6 & 7 *Vict. c.* 73, *ss.* 37, 38, 41.] The defendant in an action agreed, through his solicitor, to pay the plaintiff's solicitor a fixed sum for his costs and for his trouble in promoting a composition between the defendant and his creditors. Within twelve months of the payment of the amount the defendant took out a summons for the delivery by the plaintiff's solicitor of a bill of his costs:—*Held*, that no fraud or undue pressure upon the defendant having been established, there were no "special circumstances" within the meaning of 6 & 7 Vict. c. 73, ss. 37, 38, 40, 41, to warrant the application:—*Semble*, that the defendant was not a party "chargeable" within 6 & 7 Vict. c. 73, so as to be entitled to make the application. In re Heritage - - - - 726

SPIRITUOUS LIQUORS AND WINES—*Selling by Retail without Excise Licence—Orders taken by Traveller occupying House and Premises—Spirits not stored on Premises where Orders received*—6 *Geo.* 4, *c.* 81, *s.* 2—23 & 24 *Vict. c.* 27, *s.* 19—30 & 31 *Vict. c.* 90, *s.* 17.] The appellants were convicted under 6 Geo. 4, c. 81, s. 2, for retailing spirits in Cheltenham without a retailer's Excise licence. They carried on business as wine and spirit merchants in Worcester, and held all the necessary licences for dealing in and retailing spirits there. They did not hold a licence to retail spirits at Cheltenham; but they caused premises at Cheltenham to be let to D., one of their travellers, for their own use, took out a licence for the purpose of carrying on there the business of dealers in beer, and put up a board inscribed with their names as "Distillers, Wine Merchants, and Brewers, Worcester." D. took orders for spirits at these premises and transmitted them to Worcester, where the appellants executed them by sending spirits from Worcester:—*Held*, that the conviction must be affirmed, for the appellants must be taken to carry on business at Cheltenham as retailers of spirits, although the spirits they sold were kept in and delivered from a store in another town. Stallard *v.* Marks - - - 412

STAMP—*Order for Payment of Money—Assignment of Debt—Evidence.*] T. contracted with J. to build for him a steam launch for the sum of 80*l.*, the price to be paid when the boat should be completed and delivered. T., after receiving 40*l.* on account, addressed a letter to J. as follows: "I hereby assign to Messrs. R. & Son the sum of 40*l.* now due or that may hereafter become due in respect of the steam launch which I am building for you:"—*Held*, that T.'s letter was not an order for the payment of money, but an assignment of a debt, and might be given in evidence on payment of the proper stamp duty and penalty. Buck *v.* Robson - - - - - 686

2. —— *Appointment of New Trustee—Stamp insufficient at time of Execution, but sufficient at time of Date of Deed*—33 & 34 *Vict. c.* 97, *ss.* 15, 16, 17.] A deed, purporting to appoint a new trustee, appeared when tendered in evidence to be sufficiently stamped according to the law in force on the day when it was dated, but it was proved to have been executed some years previously, and the stamp according to the law then in force was insufficient:—*Held*, on the construction of 33 & 34 Vict. c. 97, ss. 15, 16, 17, that the deed could not be admitted in evidence.—*Gatty* v. *Fry* (2 Ex. D. 265), distinguished. Clarke *v.* Roche - - - - - - 170

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TELEGRAPH ACT, 1868 (31 & 32 *Vict. c.* 110), *s.* 8, *sub-s.* 7—*Compensation for loss of Office—Annual Emolument—Allowance for Travelling Expenses.*] The Telegraph Act, 1868 (31 & 32 Vict. c. 110), enables the Postmaster-General to purchase the undertakings of telegraph companies. By s. 8, sub-s. 7, every officer and clerk of any

TELEGRAPH ACT, 1868—*continued.*
company, the undertaking of which may be so purchased, who has been not less than five years in the service of the telegraph companies and in the receipt of a yearly salary, or who has been not less than seven years in the service of telegraph companies and is in receipt of remuneration at a rate of not less than 50*l.* a year, shall, if he receives no offer of an appointment by the Postmaster-General in the telegraphic department, &c., receive during his life from the Postmaster-General by way of compensation for the loss of his office from the time at which the Government takes possession of the company's telegraph, an annuity payable half yearly, equal, if he shall have been in the service of telegraph companies twenty years, to two-thirds of the annual emolument derived by him from his office on the 24th of June, 1868.—Mandamus to the Postmaster-General to assess compensation to S., an officer of a telegraph company, in respect of the expenses allowed him as a part of the emolument of his office. Return that it was the duty of S. from time to time, when required, to travel upon the company's business, and that the company had agreed with him upon rates of allowance, as an indemnity against the extra personal expenditure incurred, or assumed to be incurred, by him while travelling on the business of the company, beyond his ordinary expenditure, namely, 12*s.* 6*d.* for twenty-four hours' absence from headquarters, and 5*s.* for twelve hours' like absence, when such last-mentioned absence did not oblige him to stop away from home, and that the allowances so made did not form any part of his yearly salary or remuneration, but were made for the purpose of indemnifying him against extra personal expenditure, and that the refusal to assess compensation was only so far as regarded these allowances. Plea, that the allowances were not made as an indemnity, but were made to the company's officers when travelling, whether extra expense was incurred by them or not, and were fixed payments; that the company's officers when travelling received the allowances, and saved a large part of the money which they would otherwise have expended at home for board and lodging, and that the allowances were part of the annual emoluments of the officers:—*Held*, on demurrer, affirming the judgment of the Queen's Bench Division, that anything which S.'s allowance enabled him to save from his ordinary expenses was an "emolument," and therefore a subject for compensation. The Queen *v.* Postmaster-General [C. A. 428

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TRAMWAY COMPANY—*Agreement with Conductor—Manager of Company sole Judge between Company and Conductor—Jurisdiction of Magistrate, how far affected.*] The complainant became conductor of a tramway company under an agreement by which he was to pay them 5*l.*, to be retained, together with his wages for the current week, as security for the discharge of his duties and the observance of the rules of the company, &c.; the company to have power, in case of any breach by the conductor of the rules, to retain the 5*l.* and his wages for the current week as liquidated damages for such breach; and it was provided that "the manager of the company should be the sole judge between the company and the conductor whether the company was entitled to retain the whole or any part of the 5*l.* and wages for the current week as liquidated damages; and that the certificate should be binding and conclusive evidence in all courts of justice, civil and criminal, and before all stipendiary and police magistrates, &c., that the amount thereby certified as the amount to be retained was the true amount to be retained, and should bar the conductor of all right to recover it." The complainant having summoned the company before a police magistrate, under 6 & 7 Vict. c. 86, to recover his deposit and wages:—*Held*, that the agreement was not illegal, and the complaint being substantially a civil proceeding, the manager's certificate that the deposit and wages had been forfeited was conclusive evidence of the fact, precluding the magistrate from making any further inquiry. London Tramways Company *v.* Bailey - - - - - 217

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